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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 949.

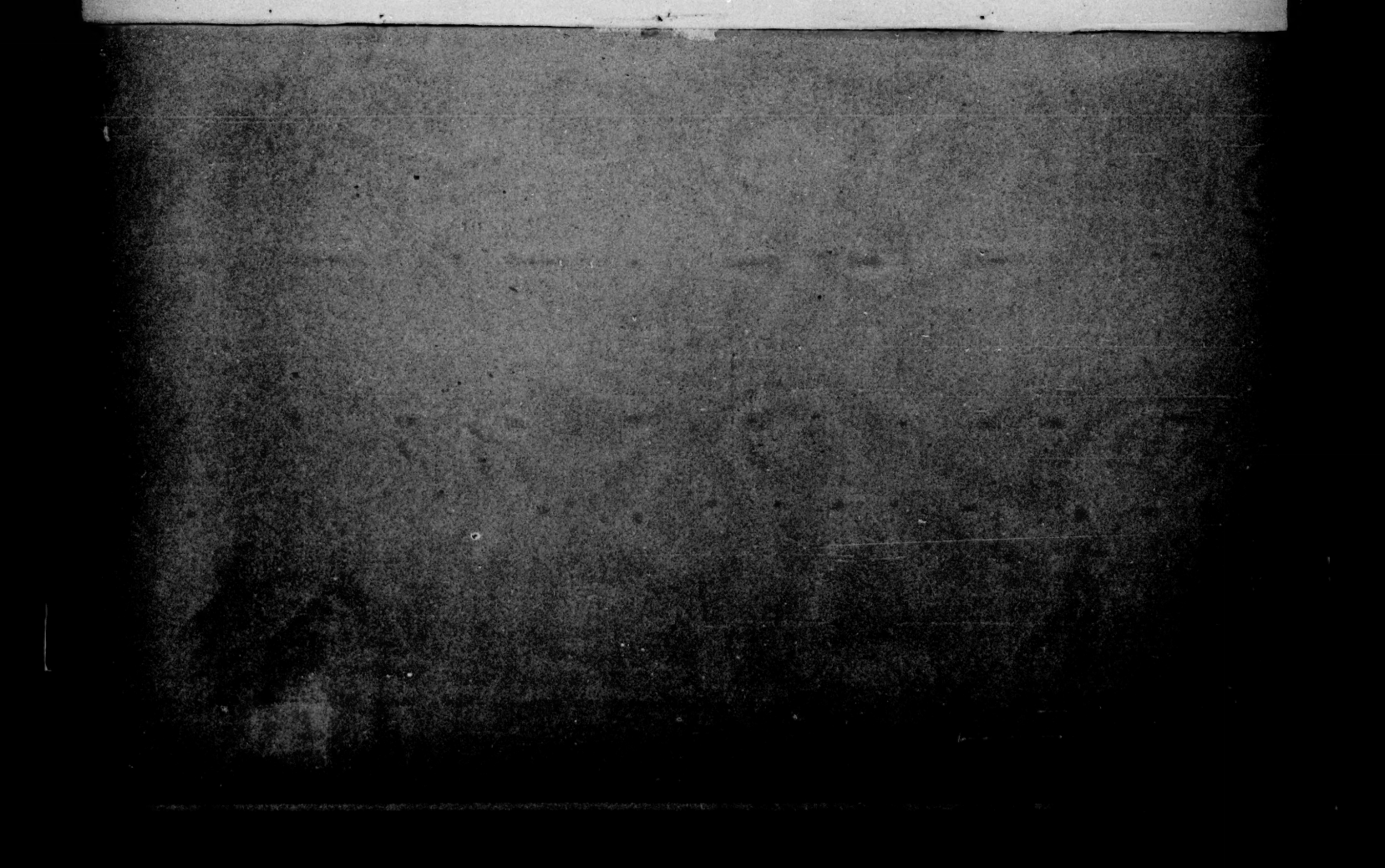
THE PLYMOUTH CONSOLIDATED GOLD MINING COMPANY ET AL., APPELLANTS,

vs.

THE AMADOR AND SACRAMENTO CANAL COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED SEPTEMBER 14, 1885.



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1 *Complaint.*

In the Superior Court, County of Sacramento, State of California.

AMADOR AND SACRAMENTO CANAL COMPANY, Plaintiff,
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, A. HAYWARD, and E. L. MONTGOMERY and WALTER S. HOBART, Defendants.

Plaintiff complains and alleges:

I.

That it now is, and at all the times herein mentioned has been, a corporation, duly organized under the laws of said State of California and doing business therein.

II.

That the defendant, the Plymouth Consolidated Gold Mining Company, is, and at all the times herein mentioned has been, a corporation duly organized and doing business in the State of California.

III.

2 That the plaintiff is, and for more than ten years last past has been, the owner in fee and in possession of a certain canal about 26 miles long, situate partly in the county of Amador, in said State, and partly in said county of Sacramento, called the Amador and Sacramento Canal, extending from a dam across the Cosumnes river, near the southeast corner of section 20, in township eight north, range nine east, Mount Diablo base and meridian, in said county of Amador, to Sebastopol, in said county of Sacramento, in section sixteen, township seven north, range seven east, Mount Diablo base and meridian, and is also the owner of the water usually flowing through said canal, and has used the said canal and water during all of said period of ten years for mining and agricultural purposes, and selling water for such purposes.

IV.

That the defendant, the Plymouth Consolidated Gold Mining Company, is the owner of two certain mills, situate at Plymouth, in said county of Amador, constructed and used for crushing gold-bearing quartz, and since the 2nd day of January, 1882, has been such owner and the defendants for three years next before the commencement of this action have, at said mills, carried on and
3 conducted the business of crushing gold-bearing quartz rock, and extracting and collecting gold therefrom, and have used large quantities of water in and about their business taken from the Moquelumne river.

V.

That from the said mills, the corporation defendant, extending in

a direction a little north of west, has a valley through which runs Little Indian creek until it intersects the said canal of plaintiff near the southeast corner of section four, in township seven north, range nine east, Mount Diablo base and meridian, and the defendants, since the first day of December, 1881, have used the said creek at their said mills as a dumping place for the tailings, sand, sediment, silt, and other debris flowing to and formed by the working of said mills.

VI.

That in and about the working and management of said mills the defendants use large quantities of water taken from the Moquelumne river and other streams by them, and which water, mixed, defiled, and polluted with said tailings, sand, quartz-sand, sediment, silt, and other debris, has *has* been, during the three years next before the commencement of this action, poured into said creek and carried by said water in said creek to and into the said canal of plaintiff.

VII.

That the said water so mixed, polluted, and defiled by the defendants and dis*e*barged by them into the plaintiff's canal as aforesaid has, during all of said three years, mingled with the pure water flowing in the said canal, and has deposited therein all the said tailings, sand, qua-tz-sand, sediment, silt, and other debris as aforesaid, and the same has been swept along the said canal of plaintiff by the force of the water flowing therein, and has been distributed and deposited therein, and thereby the bed of the said canal became and was raised, and the canal obstructed and damaged, and filled up and rendered unfit for use, and the water in said canal became loaded with said debris, and thereby rendered less useful.

VIII.

That finding the said water so poured into the said canal of plaintiff so loaded with debris, and desiring to prevent the said injury to said canal, plaintiff, at divers times within the said three years last past, at great cost and expense, constructed dams in said creek to restrain and impound and detain the said quartz-sand and other debris, and prevent the same from flowing to the canal of plaintiff, but said dams were only partially successful, and they restrained only a part of said debris, the larger part thereof passing over and into the said canal of plaintiff.

IX.

That divers times within the said three years plaintiff, by reason of the filling of its canal by the said defendants as aforesaid, *were* compelled to cease its mining operations and sale of its water so flowing into other channels, and to employ large forces of laborers to clear the said canal of the said sand — other debris, and has lost the use of its said ditch, and compelled to discharge its miners and

other men in its employ, and has sustained other injuries by the said wrongful acts of defendants.

X.

6 That by reason of the said wrongful acts of the said defendants plaintiff has sustained damages in the sum of twenty-five thousand dollars.

XI.

That the defendants threaten to continue to discharge into the said canal of plaintiff further large quantities of sand, tailings, quartz-sand, sediment, silt, and other debris, and unless restrained by the injunction of this court will continue to commit the said several wrongs and injuries.

That each year it becomes more difficult for plaintiff to protect itself from the injuries aforesaid, and, unless the said several acts of defendants shall be restrained, they will further impose damages upon plaintiff and wholly destroy the canal of plaintiff and render it unfit for use.

XII.

That plaintiff has constructed the said canal at an expense of several hundred thousand dollars, and has valuable mining grounds which can only be worked by use of said canal, and inasmuch as the plaintiff has no adequate relief at law, it asks the aid of a court of equity in securing adequate relief. That defendants also,

7 by means of mining in said Indian Creek Valley, pollute the said waters so flowing to the canal of plaintiff.

Wherefore plaintiff prays:

I. That the defendant- and each of them, their agents, servants, and employees, be enjoined and restrained from polluting the waters running into the canal of plaintiff; from turning into the said canal any tailings, sand, quartz-sand, sediment silt, or other debris, or from dumping or washing such or other debris into said Indian creek.

II. That plaintiff have judgment against defendants for $25,000.00 damages, already done to plaintiff by said wrongful acts.

III. That plaintiff have such other further or different relief as shall be proper or equitable, and—

IV. That it recover costs.

McKUNE AND GEORGE,
Attorneys for Plaintiff, No. 401 J Street, Sacramento City.

8 STATE OF CALIFORNIA, *County of Amador:*

Jennie B. Ritter, being duly sworn on oath, says that she is the managing agent of the plaintiff in the above-entitled action; that she has heard the foregoing complaint read, and knows the contents thereof, and that the same is true of her knowledge, except as to matters therein stated on her information and belief, and as to those she believes it to be true.

JENNIE B. RITTER.

Sworn and subscribed to before me, this 9th day of January, 1885.
[SEAL.] J. W. SURFACE,
Notary Public, Amador Co., Cal.

(Endorsed:) Filed January 13th, 1885. Clerk, Wm. B. Hamilton.

9 *Sheriff's Return.*

OFFICE OF THE SHERIFF OF THE
CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the annexed summons on the 14th day of February, A. D. 1885, and personally served the same on the 14th day of February, A. D. 1885, upon Alvinzo Hayward, one of the —, by delivering to Alvinzo Hayward, said defendant, personally, in the city and county of San Francisco, a copy of said summons attached to a copy of the complaint in said action therein named.

Dated at San Francisco, this 14th day of February, 1885.
PETER HOPKINS, *Sheriff*,
By W. H. BIGGER,
Deputy Sheriff.

10 *Sheriff's Return.*

OFFICE OF THE SHERIFF OF THE
CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the annexed summons on the 14th day of February, A. D. 1885, and, after due and diligent search and inquiry, I am unable to find Walter S. Hobart, the therein-named defendant, in said city and county.

PETER HOPKINS, *Sheriff*,
By W. H. BIGGER,
Deputy Sheriff.

Being informed by A. Hayward that W. S. Hobart was in Mexico, and that he could not tell when he would return.

11 STATE OF CALIFORNIA, } *ss:*
County of Sacramento, }

Aff'd'v't of Byam.

H. S. Byam, being duly sworn, says:

That he is a white male citizen of the United States, and not a party to the action in which the annexed summons was issued, and that at all times herein mentioned he was over the age of eighteen years.

That he personally served the annexed summons on E. L. Montgomery, one of the defendents named in said summons, on the 4th day of February, 1885, by delivering to said defendant personally, on said date, in the county of Amador, in said State, a copy of said summons, with a copy of the complaint referred to in said summons.

That affiant also on the 5th day of February, 1885, *also* personally

served the annexed summons on the Plymouth Consolidated Gold Mining Company by delivering to E. L. Montgomery, on said date, at Plymouth, in said county of Amador, a copy of said summons.

That said Plymouth Gold Mining Company is, and at all the times herein mentioned was, a corporation organized under the laws
12 of the State of New York, doing business in the State of California, and having its principal place of business at Plymouth, in said county of Amador.

That said E. L. Montgomery, in and at all the times herein mentioned, was the duly authorized and acting agent of said corporation, and the person designated by said company as the person upon whom process is to be served on behalf of said corporation.

H. S. BYAM.

Sworn and subscribed to before me this 6th day of February, 1885.

[SEAL.] WILBUR F. GEORGE,
Notary Public.

13 *Summons.*

STATE OF CALIFORNIA, }
County of Sacramento, } *ss:*

In the Superior Court in and for said County.

The people of the State of California to Plymouth Consolidated Gold Mining Company, A. Hayward, E. L. Montgomery, and Walter S. Hobart, Greeting:

You are hereby notified that an action was commenced in the superior court of the county of Sacramento, State aforesaid, by filing a complaint in the clerk's office of said court on the 13th day of January, 1885, in which action the Amador and Sacramento Canal Company [is] plaintiff and you are defendants.

That the general nature of the action, as appears from said complaint, is as follows: To recover judgment against you, the said defendants, for the sum of $25,000 damages, alleged to have been sustained by plaintiff by reason of certain tailings, silt, sediment, sand, quartz sand, and other debris having been deposited by defendants for 3 years last past into Little Indian creek, and carried by the waters of said creek down to and into the canal of plaintiff, known as the Amador and Sacramento Canal, situate in the counties
14 of Amador and Sacramento and running from Consumnes river to Sebastopol, and thereby polluting the water flowing in said canal, rendering it unfit for use or sale, and thereby causing the damages alleged; also for an injunction restraining defendants, their agents and employees, from continuing to dump and deposit such debris into said Indian creek, and to prevent the flowing of the same into plaintiff's said canal; also for general relief and for costs. All of which will more fully appear by reference to the complaint on file herein, reference to which is hereby made, and you are hereby directed to appear and answer said complaint within ten days from the service of this writ, exclusive of the day of service

if served on you in said county of Sacramento, and within thirty days, exclusive of the day of service, if served elsewhere; and you are further notified that unless you so appear and answer within the time above specified the plaintiff will apply to the court for the relief demanded in said complaint.

In testimony whereof I, Wm. B. Hamilton, clerk of the court aforesaid, do hereunto set my hand and affix the seal of said court, this 23d day of January, A. D. 1885.

[SEAL.] WM. B. HAMILTON, *Clerk.*

(Endorsed:) Filed this 13th day of April, 1885. Wm. B. Hamilton, clerk.

15 *Dem'r of Plym. Con. G. M. Co.*

In the Superior Court of the County of Sacramento, State of California.

AMADOR and SACRAMENTO CANAL COMPANY, Plaintiff,

vs.

PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, A. HAYWARD, E. L. MONTGOMERY, and W. S. HOBART, Defendants.

Now comes the Plymouth Consolidated Gold Mining Company, one of the above-mentioned defendants, by its attorney, John H. Bolt, and demurs to the complaint of plaintiff on file herein, and for grounds of demurrer states the following:

I.

That it appears by said complaint that there is a misjoinder of parties defendant herein in this: That the Plymouth Consolidated Gold Mining Company is improperly joined as a defendant, with A. Hayward, E. L. Montgomery, and W. S. Hobart, the other
16 defendants in said action, but there is no privity or connection shown in the complaint between this defendant and said other defendants; on the contrary, it appears by the complaint that this defendant is the owner of the mills mentioned in the complaint, and said complaint also alleges that this defendant has a valley, through which runs Little Indian creek, by and through which the alleged grievances complained of were caused, and it does not appear that the other defendants, or either of them, have any ownership in or connection with either said mills or said Indian creek.

II.

That said complaint is ambiguous, uncertain, and unintelligible in this:

I. That it does not appear in said complaint whether there is or not any water usually or ordinarily flowing in said Indian Creek, or whether the tailings, sand, quartz-sand, sediment, silt, and other debris complained of were or are carried down or along said Indian creek by the water naturally flowing in or belonging to said Indian

creek, or whether they were or are carried along or down said creek by the water or tailings discharged from the mills mentioned in the complaint, nor does it appear whether there would be any water at all flowing into plaintiff's canal, unless such water were
17 first brought from other sources to said mills and discharged from them into said Indian creek.

2nd. And also in this:

The complaint alleges that this corporation, defendants, is the owner of certain mills; that the defendants have carried on and conducted at said mills the business of crushing gold-bearing quartz rock, and extracting and collecting gold therefrom, and have used large quantities of water without showing how or in what manner said alleged business was carried on or conducted by said defendants, whether as partners or jointly or otherwise or any connection between this defendant and said other defendants sued with it in said action, nor whether the grievances charged were the joint or several acts of said defendants.

3d. And also in this:

The complaint alleges that this defendant has a valley through which runs "Little Indian creek," without showing how it has the valley or what connection the valley has to the creek, at the place defendants are alleged to have used the creek, as a dumping place for tailings & etc.

4th. And also in this:

Because, while the complaint alleges "that defendants also by means of mining in said Indian creek valley pollute the said water so flowing to the canal of plaintiff," it does not show how said
18 defendants mined in said Indian creek, where they mined, whether jointly or severally, or how or why their mining operations pollute the water, and is not connected with any allegation in said complaint.

5th. Because said complaint does not show which of said defendants threaten to continue the grievances complained of.

III.

Said complaint does not state facts sufficient to constitute a cause of action against this defendant; therefore this defendant prays to go hence with its costs.

JOHN H. BOALT,
Att'y for Defendant.
PLYMOUTH CONSOLIDATED GOLD MINING CO.

(Endorsed:) Service of copy of the within demurrer admitted, this 3d day of April, A. D. 1885. McKune & George, attorneys for plaintiff. Filed April 3rd, 1885. Wm. B. Hamilton, clerk.

19 *Demurrer of Hayward et al.*

In the Superior Court of the County of Sacramento, State of California.

AMADOR AND SACRAMENTO CANAL COMPANY, Plaintiff,
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, A. HAYWARD, E. L. MONTGOMERY, and WALTER S. HOBART, Defendants.

Now come the defendants, A. Hayward, E. L. Montgomery, and Walter S. Hobart, defendants above named, and demur to the complaint of plaintiff on file herein, and for grounds of demurrer state the following:

I.

That it appears by said complaint that there is a misjoinder of parties defendant herein in this, that these defendants are improperly joined as defendants with said Plymouth Consolidated Gold Mining Company, the other defendant in said action; but
20 there is no priority or connection shown in the complaint between these defendants and the said Plymouth Consolidated Gold Mining Company. On the contrary, it appears by the complaint that these defendants are not the owners and have no interest in the mills mentioned in the complaint, nor has either of them any interest therein; and said complaint also alleges that said defendant, Plymouth Consolidated Gold Mining Company, "has a valley through which runs Little Indian creek," by and through which the alleged grievances complained of were caused; and it does not appear that these defendants, or either of them, have any ownership in or connection with said mills or said Indian creek.

II.

That said complaint is ambiguous, uncertain, and unintelligible, in this—

I. That it does not appear in said complaint whether there is or not any water usually or ordinarily flowing in said Indian creek, or whether the tailings, said quartz, said sediment, silt, and other debris complainer of were or are carried down or along said Indian creek by the water naturally flowing in or belonging to said Indian creek, or whether they were or are carried along or down said creek by the water or tailings discharged from the mills mentioned in
21 the complaint, nor does it appear whether there would be any water at all flowing into plaintiff's canal, unless such water were first brought from other sources to said mills and discharged from them into said Indian creek.

II. And also in this: The complaint alleges that said corporation, defendant, Plymouth Consolidated Gold Mining Company, is the owner of certain mills, and that defendants have carried on and conducted at said mills the business of crushing gold-bearing quartz-rock and extracting and collecting gold therefrom, and have used

large quantities of water without showing how or in what manner said alleged business was carrid on or conducted by said defendants, whether as partners or jointly or otherwise, or any connection between these defendants or either of them; and said defendant, Plymouth consolidated Gold Mining Company, nor whether the grievances charged were the joint or several acts of said defendants.

III. And also in this: The complaint alleges that said defendant, Plymouth Consolidated Gold Mining Company, has a valley through which runs "Little Indian creek," without showing how it has said valley or what connection the valley has to the creek
22 at the place defendants are alleged to have used the creek as a dumping place for tailings, etc., or that these defendants or either of them had any connection with said valley or creek, or with said defendant, Plymouth Consolidated Gold Mining Company.

IV. And also in this: Because the allegation, in said complaint, "That defendants also by means of mining in said Indian creek pollute the said water so flowing to the canal of plaintiff," does not show how said defendants mined in said Indian creek, where they mined jointly or severally, or how or why their alleged mining operations polluted the water and is not connected with any other allegation in said complaint.

V. Because said complaint does not show which of said defendants threatens to continue the grievances complained of.

III.

That said complaint does not state facts sufficient to constitute a cause of action against these defendants or against either of them. Wherefore said defendants ask to be hence dismissed with their costs in this behalf expended.

JOHN H. BOALT,
Attorney for Defendants Hayward, Hobart, and Montgomery.

(Endorsed:) Service of a copy of within demurrer admitted this 3d day of April, A. D. 1885. McKime and George, attorneys for pl'ffs. Filed April 3rd, 1885. Wm. B. Hamilton, clerk.

23 *Demurrer to Complaint. Order entered April* 16, 1885.

STATE OF CALIFORNIA, *County of Sacramento:*

In the Superior Court.

AMADOR AND SACRAMENTO CANAL COMPANY
vs.
THE PLYMOUTH CONSOLIDATED GOLD MINING COMPANY *et al.* } 2199

This cause coming on regularly to be heard this day, with McKime and George appearing as counsel for the plaintiff and W. H. Beatty appearing for John H. Boalt, who is the counsel for the defendants.

Whereupon the defendants withdraw their demurrer, and it is

ordered by the court that the said defendants have 10 days' time in which to file an answer.

April 6th, 1885.

A true copy.

Attest: WM. B. HAMILTON, *Clerk.*

[SEAL.] By W. W. RHOADES, *Deputy.*

24 *Ans. of Plymouth G. M'g Co.*

In the Superior Court of the County of Sacramento, State of California.

SACRAMENTO AND AMADOR CANAL COMPANY, Plaintiff,

vs.

PLYMOUTH CONSOLIDATED GOLD MINING COMPANY *et als.*, Defendants.

Now comes the Plymouth Consolidated Gold Mining Company, and, answering the complaint of plaintiff on file herein, respectfully shows the court as follows:

This defendant admits that it is a corporation, but denies that it has been a corporation during all the times mentioned in the complaint, or that it is or was organized in the State of California, but, on the contrary, this defendant avers that it was organized on the 1st day of June, 1883, and not before, and in the State of New York, and under the laws of said State, and that it ever since has existed, and still continues to exist, under and by virtue of the laws of the State of New York, and that its principal place of business is in the city of New York, in said State.

25 And defendant avers that its corporate powers are by the laws of said State vested in a board of trustees, consisting of seven members, and that two of the other defendants herein, to wit, Alvinza Hayward and W. S. Hobart, are, and have been since the date of its organization, officers of this defendant, to wit, members of said board of trustees, and that the remaining defendant herein, to wit, E. L. Montgomery, is, and has been since the date of its organization, an officer of this defendant, to wit, the superintendent of its mines and mills.

As to the allegations contained in paragraph III of plaintiff's complaint, that it is and has been for more than ten years last past the owner in fee and in possession of that certain canal mentioned and described in said paragraph III, and that it is also the owner of the water usually flowing through said canal, and has used the said water for said period of ten years for the purposes mentioned in said paragraph, this defendant has not sufficient information or belief to enable it to answer the same, and therefore denies the said allegations and each and all of them. This defendant denies that it has been the owner of those two certain mills mentioned

26 in the complaint during the time mentioned therein, but it admits that it is now the owner of said mills, and has been the owner ever since the date of its organization aforesaid, and that ever since said date and next before the commencement of this action it has at said mills carried on and conducted the business of crushing

gold-bearing quartz rock and extracting and collecting gold therefrom, and used large quantities of water in and about said business, and that some of said water was taken from the Moquelumnes river, but it denies that all of said water was taken therefrom, and it denies that it has during the time alleged in the complaint, or at any other time, or at all, carried on or conducted at said mills, or either of them, or elsewhere, the said business, or any business, or has used large quantities of water, or any water, in or about said business or otherwise, in connection with the other defendants mentioned in the complaint, or either of them, but, on the contrary, this defendant avers that said business has been carried on and conducted and said water has been used by this defendant exclusively and for its sole use and benefit and without any connection or combination with the other defendants in this action, or either of them, and that this
27 defendant has not had, during any of the times mentioned in the complaint, and does not now have, any connection or relation with said Hayward or Hobart or Montgomery other than such official relation aforesaid.

And this defendant denies that it has used since the date mentioned in the complaint, or since any other date, or has used or uses at all the creek mentioned in paragraph 5 of plaintiff's complaint, or any such creek or valley, at its said mills or elsewhere, with the other defendants herein, or with either of them, or with any other person, as a dumping place for the tailings or sediment or silt or other debris flowing to or formed by the working of said mills, or either of them, or that it has used the said creek at all except as hereinafter expressly admitted.

And this defendant denies that in or about the working or management of its said mills, or either of them, this defendant, with the other defendants herein, or either of them, has used large quantities or any quantity of water taken by them or any of them from the Moquelumne river or other streams, or that said water, or any water, mixed, defiled, or polluted as alleged in the complaint, or otherwise, has been, during the time alleged in the complaint, or
28 any time, or at all, poured into the creek mentioned in the complaint, or carried by said water in said creek or carried at all down said creek or into the canal of plaintiff.

And this defendant denies that in or about the working or management of its said mills or elsewhere it has used any water at all except as hereinafter expressly admitted.

And this defendant denies that the said or any water in any way mixed or polluted or defiled, by this defendant, with the other defendants or either of them, or discharged by them or either of them into plaintiff's said canal, or otherwise, has, during the time mentioned in the complaint or during any time or at all, mingled with the pure water or with any water flowing in said canal; and denies that the same has deposited in said plaintiff's canal any tailings, sand, quartz-sand, sediment, silt, or other debris, or that the same has been swept along said canal by the force of the water flowing therein, or that thereby the bed of said canal became or was raised or the canal obstructed or damaged or filled up or rendered unfit

for use, or that the water in said canal became loaded with said or any debris or thereby rendered less useful; and denies that
29 any water at all used by this defendant has ever been discharged into plaintiff's canal, except as hereinafter expressly admitted.

As to the allegations contained in paragraph VIII of plaintiff's complaint, that plaintiff, for the purposes mentioned in the complaint, at the time mentioned therein, constructed dams in said creek at great cost and expense, and that said dams were only partially successful and restrained only a part of said debris, this defendant has not sufficient information or belief to enable it to answer the same, and therefore denies said allegations and each and all of them.

And this defendant denies that by reason of the alleged filling of plaintiff's canal by this defendant, with the other defendants herein or either of them, plaintiff was compelled or did cease its mining or any operations, or the sale of its water, or did cease to employ large or any forces of laborers or any laborers for the purposes mentioned in the complaint or otherwise, or that thereby it has lost the use of its said ditch, or was compelled to or did discharge its miners or other men in its employ or any of them; and denies that it either singly or with said other defendants or either of them or at
30 all filled said canal with water, or water mixed, defiled, or polluted with any tailings, sand, sediment, quartz-sand, or other debris or anything whatever; and denies plaintiff has sustained other or any injuries or injury by said or any wrongful acts of this defendant or of this defendant with the other defendants or either of them.

And this defendant denies that by reason of said or any wrongful act of this defendant, either singly or with the other defendants, or either of them, plaintiff has sustained damages in the sum of $25,000 or in any sum whatever.

And this defendant denies that it either singly or with the other defendants, or either of them, threatens or ever has threatened to continue to discharge into plaintiff's said canal further large or any quantities or quantity of sand, tailings, quartz-sand, sediment, silt, or other debris, or that unless restrained by the injunction of this court it will continue to commit the several wrongs or injuries alleged in the complaint, or any of them.

And this defendant denies that each year it becomes more difficult or at all difficult for plaintiff to protect itself from any injuries or injury caused by this defendant, either singly or with the
31 other defendants, or *or* either of them, and denies that unless the acts of this defendant be restrained this defendant, either singly or with the other defendants, or either of them, will further impose damages upon plaintiff or wholly destroy the canal of plaintiff or render it unfit for use.

And this defendant denies that by means of mining in Indian creek valley this defendant, either singly or with the other defendants, or either of them, pollute or has polluted the said waters, or any waters flowing into the canal of plaintiff, and this defendant avers that during all the times mentioned in the complaint it has

not mined nor is it now mining in said Indian creek valley, either with said other defendants or either of them, or with any one else.

As to the allegations contained in paragraph XII of plaintiff's complaint, that plaintiff has constructed its said canal at an expense of several hundred thousand dollars, and has valuable mining ground, which can only be worked by use of said canal, this defendant has no information or belief sufficient to enable it to answer the same, and it therefore denies said allegations and each and all of them.

And, further answering the plaintiff's complaint therein,
32 this defendant alleges that prior to the 6th day of June, 1872, the Phœnix Gold Mining Company was a corporation duly organized and existing under and by virtue of the laws of the State of California.

That on or about said 6th day of June, 1872, the said Phœnix Gold Mining Company corporation aforesaid entered into an agreement in writing with the present plaintiff, the Sacramento and Amador Canal Company, which said contract is in words and figures following, to wit:

"*Agreement.*

"Sacramento and Amador Canal Company and Phœnix Gold Mining Company.

"This agreement, made and entered into this sixth day of June, 1872, between the Amador and Sacramento Canal Company, party of the first part, and the Phœnix Gold Mining Company of Amador, party of the second part, both being bodies corporate under the laws of the State of California, witnesseth:

"Article I.

"The party of the first part hereby grant- to the party of the second part the right to take, by the means of the Enterprise
33 ditch, out of *out of* the middle fork of the Cosumnes river, during the dry season of the year, when there is not enough water therein to supply the canal of the party of the first part, a quantity of water per diem, of twenty-four hours each, sufficient to supply and operate the mill of the party of the second part erected, or contemplated to be erected, between the shaft of the Phœnix mine and the mouth of Parkerville cañon, provided that the party of the second part shall return to the ditch of the Amador and Sacramento Canal Company, at a place known as the mouth of the Parkersville cañon, at the barn in the Wilson ranch, all of the water run through the full length of the Enterprise ditch to the flume across Indian creek, less the necessary waste; and upon the further condition that the party of the second part shall, for the water so taken during the dry season of the year when there is not enough water in the river to supply the canal of the party of the first part, pay to the party of the first part, in gold coin, five cents per inch for a run of twenty-four hours for the water so taken by said party of the second part, which water shall be measured at the crossing of Big Indian creek.

"Article II.

34 "The said party of the second part agrees to pay to said party of the first part the foregoing rate for the water so taken by it, under article I hereof; that is to say, for every inch of water taken as aforesaid, measured according to the custom of mines under a six-inch pressure, and used or run for twenty-four hours, it will pay to the party of the first part therefor the sum of five cents per inch in United States gold coin; and the said party of the second part further agrees with the party of the first part to return to it at the mouth of Parkerville cañon all the water taken from the middle fork of Cosumnes, and run by it at all seasons of the year, less the necessary waste occasioned by its use for the milling purposes described in article I hereof: Provided, however, That during that portion of each year in which the party of the second part is not required to pay for water according to article I hereof the amount of water so to be returned by the party of the second part to the canal of the party of the first part shall not exceed four hundred inches measured as aforesaid.

"Article III.

"This agreement shall continue so long as the party of the second part shall work their mine and run their mill, for the use of
35 which said water is intended, and shall be faithfully observed by both parties, their successors and assigns.

In witness whereof both parties, by their proper officers, have executed this agreement the day and year first above written.

"[SEAL.] (Signed) AMADOR AND SACRAMENTO CANAL CO.
"By ROBERT C. CLARK, *President.*
"BEN. BULLARD, JR., *Secretary.*
"[SEAL.] PHŒNIX GOLD MINING COMPANY,
"By J. D. FRY, *President.*
"CHARLES E. ELLIOT, *Secretary.*"

That said Phœnix Gold Mining Company had at said date already erected, or was about to erect, that certain mill then known as the Phœnix mill, the same being one of the mills mentioned and referred to in the complaint herein, and described therein as the property of this defendant.

That the valley mentioned in the complaint herein and described in paragraph V thereof as 'a valley through which runs little Indian creek' was then known as Pokerville cañon; and this defend-
ant, upon information and belief, further avers that after the
36 execution of the said contract by the parties thereto, and from that date down to the present time, the said Phœnix Gold Mining Company, its successors and assigns, has ever fully and faithfully performed all the obligations by it to be done or performed under said contract.

That by means of the ditch mentioned in said contract the said

Phœnix Gold Mining Company took said water out of said river and conducted it to its said mill and returned to said plaintiff at the point mentioned in said contract all of said water so taken, less the necessary waste and evaporation, and that said Phœnix Gold Mining Company, its successors and assigns, has ever continued so to do.

That said Phœnix Gold Mining Company faithfully paid to the said Sacramento and Amador Canal Company the sum agreed upon to be paid by it under the terms of said contract, and that it and its successors and assigns have ever continued so to do until the modification in the terms of said contract hereinafter set forth.

That the water so obtained from and through said Enterprise ditch not being sufficient to run and operate the said Phœnix mill, the said Phœnix Gold Mining Company, its successors and assigns, were compelled to and did procure other water from other sources, the aggregate amount whereof greatly exceeded the amount
37 of water derived through said Enterprise ditch.

That about the year 1877 the said Sacramento and Amador Canal Company, the plaintiff herein, through its authorized agent or agents, represented to the said Phœnix Gold Mining Company that it was greatly in need of water, and that if said Phœnix Gold Mining Company would deliver to it, said plaintiff, at the point mentioned in said contract, out of the water flowing from its said mill, enough water to make the aggregate amount then delivered six hundred inches, instead of the smaller amount to which the plaintiff was entitled under the terms of said contract, then and in such event the said plaintiff would waive and remit the money payment to be made to said plaintiff under said contract for the use of said water.

That plaintiff's said proposal was accepted, and thereupon and thereafter there was furnished to plaintiff, and at its special instance and request, by said Phœnix Gold Mining Company, its successors and assigns, said six hundred inches of water as proposed.

That said arrangement has continued from said year 1877 until the present time, with the exception of the year 1882, when said plaintiff elected to receive the money payment instead of said additional water, and the money was accordingly paid to plaintiff
38 according to the terms of said original contract of the 6th of June, 1872.

That the water so delivered has always been of the character and quality usually flowing from mills which are used for crushing quartz rock and extracting gold therefrom.

That it was well understood by both of the parties to the original contract of June 6th, 1872, that the water to be used by the Phœnix Gold Mining Company under the terms of said contract would become more or less impregnated with tailings and debris by passing through the mill of said company, and that it could not be used at all without such result; and it was well understood and agreed between the plaintiff and the Phœnix Gold Mining Company, when the modification aforesaid in the terms of said contract was made in the year 1877, that if additional water were furnished to said plain-

tiff in lieu of the money payment to be made under said contract, that said additional water would be of the same nature and quality as that then before furnished, and would contain more or less tailings and debris.

And this defendant avers that on or about the 1st day of June, A. D. 1883, it succeeded by mesne conveyances, transfers, and assignments to all the mines, mills, and water rights and privileges
39 formerly owned or possessed by the said Phœnix Gold Mining Company, and, in particular, that it then succeeded to and became possessed of all the rights and privileges of the said Phœnix Gold Mining Company under the contract aforesaid between said last-named company and the plaintiff herein, and ever since has possessed and still possesses the same.

That plaintiff has ever known of and acquiesced in said change of possession, and that this defendant has ever fully and faithfully performed all the duties and obligations on its part to be performed under said contract as the successor in interest of said Phœnix Gold Mining Company.

That ever since said 1st day of June, 1883, this defendant, in pursuance of said contract as aforesaid, has discharged a portion of the water flowing from its said mills into Indian creek valley, but that said water was and ever has been so discharged at the special interest and request of plaintiff, and with full knowledge on the part of said plaintiff; that said water was necessarily mixed with more or less tailings and debris.

And this defendant further avers that from the point where the said water from this defendant's mills is discharged into said Indian creek valley down to the point where the canal of plaintiff
40 opens into said creek or valley the distance is about four or five miles or more, and upon information and belief this defendant avers that if the water from its said mills were not allowed to pour into said creek or valley there would be no water whatever ordinarily flowing down said valley at the point where plaintiff's canal opens into the same, and that but for the water so supplied by this defendant there would be no water whatever flowing into plaintiff's said canal from said creek or valley.

That plaintiff has constructed, and during all the times mentioned in the complaint herein has maintained, a dam in said creek or valley and an inlet therefrom into plaintiff's said canal, and, as this defendant is informed and believes, said dam and inlet were so constructed and have been since maintained for the purpose and with the object of diverting the waters so discharged by this defendant and its predecessors in the ownership of said mills, and but for plaintiff's said dam and inlet none of the water so discharged by this defendant or its predecessors aforesaid would have flowed into said canal, nor, as this defendant is informed and believes, would any water whatever have flowed therein.

41 Wherefore this defendant, having fully answered, prays to be hence dismissed with its costs herein expended.

JOHN H. BOALT,
Att'y for Defendant.

PLYMOUTH CONSOLIDATED GOLD MINING COMPANY.

STATE OF CALIFORNIA, } ss:
County of Amador, }

E. L. Montgomery, being duly sworn, deposes and says that he is an officer, to wit, the superintendent, of the Plymouth Consolidated Gold Mining Company, defendant aboved named; that he has read the above and foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

E. L. MONTGOMERY.

Subscribed and sworn to before me this 15th day of April, A. D. 1885.

[SEAL.] J. W. SURFACE,
Notary Public in and for Amador County, Cal.

(Endorsed:) Filed April 15, 1885. W. B. Hamilton, clerk, by W. W. Rhoades, deputy.

42 *Ans'r of Hayward et al.*

In the Superior Court, County of Sacramento, State of California.

AMADOR AND SACRAMENTO CANAL COMPANY, Plaintiff,
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, A. HAYWARD, E. L. MONTGOMERY, and WALTER S. HOBART, Defendants.

Now comes the above-named defendants, A. Hayward, E. L. Montgomery, and Walter S. Hobart, and for their separate answer to the complaint of plaintiff filed herein, respectfully show to the court as follows:

First. These defendants admit that the defendant Plymouth Consolidated Gold Mining Company, above named, is the owner of the two mills described in the complaint in this action; but they, and each of them, deny that they, or either of them, for three years next before the commencement of this action, or at any other time or times,
43 or at all, have or has with said defendant Plymouth Consolidated Gold Mining Company, or otherwise. or at all, carried on or conducted the business of crushing gold-bearing quartz rock, or extracting or collecting gold therefrom, at the mills described in plaintiff's complaint filed herein, or at either of them, or that they, or either of them, have or has with said Plymouth Consolidated Gold Mining Company, or otherwise, or at all, used large or any quantities of water in or about said or any business at said mills taken from the Moquelumne river, or any source whatever.

Second. These defendants deny that they, or either of them, have or has with said defendant Plymouth Consolidated Gold Mining Company, or otherwise, or at all, since the 1st day of December, 1881, or at any other time or times, or at all, used the creek described in the complaint herein at said mills as a dumping place for any tailings, sand, sediment, silt, or other debris; and deny that they, or either of them, with said Plymouth Gold Mining Company,

or otherwise, or at all, have or has, at any time dumped any tailings, sand, sediment, silt, or other debris in said creek at said mills, or at either of them.

Third. The defendants deny that they, or either of them
44 with said Plymouth Consolidated Gold Mining Company, or otherwise, use large or any quantity or quantities of water, or any water at all, in or about the working or management of said mills, or either of them, and deny that any water used by these defendants, or either of them, with said Plymouth Consolidated Gold Mining Company, or otherwise, mixed, defiled, or polluted with tailings, sand, sediment, quartz-sand, silt, or other debris, has been, during three years next before the commencement of this action, or at all, poured into said creek, or was or has been carried by the waters of said creek, or otherwise, down said creek to or into the canal of plaintiff, and deny that they, or either of them, with said Plymouth Consolidated Gold Mining Company, or otherwise, work said mills, or either of them, or that they, or either of them, with said Plymouth Consolidated Gold Mining Company, or otherwise, work said mills, or either of them, or that they, or either of them, with said Plymouth Consolidated Gold Mining Company, or otherwise, or at all, ever worked said mills, or either of them.

Fourth. The defendants deny that said or any water, mixed, polluted, or defiled, as aforesaid, or otherwise, was by these de-
45 fendants, or either of them, with said defendant, Plymouth Consolidated Gold Mining Company, or otherwise, or at all, discharged into plaintiff's said canal, and deny that any water used by these defendants, or either of them, with said defendant, Plymouth Consolidated Gold Mining Company, or otherwise, mixed, polluted, or defiled, as aforesaid, or otherwise, during three years before the commencement of this suit, or at all, mingled with the pure or any water flowing in said canal of plaintiff or deposited therein any tailings, sand, quartz-sand, sediment, silt, or other debris, or that the same was or has been swept along the said canal of plaintiff by the force of the waters flowing therein, or otherwise, or that the same was distributed or deposited in said canal of plaintiff, or that thereby the bed of said canal became raised or was obstructed or damaged or filled or rendered unfit for use, or that the waters in said canal thereby became or was loaded with said or any debris, or became or was thereby rendered less useful.

Fifth. In answer to paragraph VIII of said complaint these defendants deny that they, or either of them, with said defend-
46 ant, Plymouth Consolidated Gold Mining Company, or otherwise, or at all, poured any water into said canal of plaintiff, loaded with debris or any other thing, or that plaintiff, to prevent any injury to its said canal, caused by any act or acts of these defendants, or either of them, with said Plymouth Consolidated Gold Mining Company, or otherwise, at divers or any times within three years before the commencement of this action, or at all, constructed any dam or dams in said creek, at great or any expense, to restrain, impound, or detain said or any quartz, sand, quartz-sand, or other debris from flowing or to prevent the same from flowing to plain-

tiff's said canal, or that said or any dam or dams constructed by plaintiff for the purposes aforesaid were only partially sucessful, or restrained only a part of said debris, or that the larger part thereof, or of any debris caused by any act or acts of these defendants or of either of them, with said defendant, Plymouth Consolidated Gold Mining Company, or otherwise, passed over or into said plaintiff's canal.

Sixth. The defendants deny that at divers or any time or times within three years before the commencement of this action, or at all, said plaintiff, by reason of the alleged filling of its said canal, or otherwise, by these defendants, or either of them, with said
47 Plymouth Consolidated Gold Mining Company, or otherwise, or by reason of any other act or acts of these defendants, or either of them, with said Plymouth Consolidated Gold Mining Company, or otherwise, was compelled to or did cease any of its mining operations, or the sale of its water flowing in said canal, or was compelled to or did divert said water into other channels, or was compelled to or did employ large or any force or forces of laborers or any laborers to clear said canal of said *canal of said* or any sand or debris, or that it has lost the use of its said ditch, or that it was compelled to discharge any of its miners or other men in its employ, or that it has sustained any other injury or injuries whatever by reason of any act or acts of these defendants, or either of them, with said Plymouth Consolidated Gold Mining Company, or otherwise, or at all. And these defendants deny that they, or either of them, with said Plymouth Consolidated Gold Mining Company, or otherwise, or with any person or persons whatever, filled said canal of plaintiff with water, or with water mixed, defiled, or polluted with tailings, sand, sediment, quartz-sand, or other debris or thing whatever.

Seventh. These defendants deny that by reason of said act
48 or acts, or of any other act or acts of these defendants, or either of them, either with said Plymouth Consolidated Gold Mining Company, or with any other person or persons, or otherwise, or at all, said plaintiff has sustained damage in the sum of twenty-five thousand dollars, or in any sum whatever.

Eighth. These defendants deny that they, or either of them, with said defendant, Plymouth Consolidated Gold Mining Company, or otherwise, threaten to continue to discharge large or any quantity or quantities of sand, tailings, quartz-sand, sediment, or silt, or any other debris or thing whatever, into said plaintiff's canal, and deny that, unless restrained by the injunction of this court, they or either of them, with said Plymouth Consolidated Gold Mining Company, or with any person or persons whatever, or otherwise, will continue to commit the said several or any alleged wrongs or injuries complained of by said plaintiff, or any wrongs or injuries whatever, against said plaintiff; and these defendants deny that it becomes more difficult each year, or at all difficult, for said plaintiff to protect itself from said alleged wrongs or injuries, or any wrongs or injuries whatever, committed by these defendants, or either of them, either with
49 said Plymouth Consolidated Gold Mining Company or any other person or persons whatsoever, and deny that these de-

fendants, or either of them, have committed any wrongs, or injury or injuries, against said defendant, with said Plymouth Consolidated Gold Mining Company, or any person or persons whatever, or otherwise, or at all, and deny that they, or either of them, will, unless the said several or any acts or act charged, or any act or acts of these defendants, or of either of them, with said Plymouth Consolidated Gold Mining Company, or otherwise, be restrained by this court, impose damages upon said plaintiff, or that they, or either, will wholly, or at all, destroy or injure plaintiff's said canal, or in any manner render it unfit for use.

Ninth. That as to the allegations in said complaint, to wit, that plaintiff has constructed its said "canal at an expense of several hundred thousand dollars," and "has valuable mining ground which can only be worked by use of said canal," these defendants aver that they have no information or belief, nor has any of them any information or belief, in regard to the subject-matter thereof sufficient to enable them, or either of them, to answer said allegations, and on that ground these defendants, and each of them, deny said allegations, and the whole of the same and each thereof.

Tenth. These defendants, further answering, deny that they, or either of them, with said defendant, Plymouth Consolidated Gold Mining Company, or with any other person or persons, or otherwise, or at all, by means of mining in the said Indian creek valley, described in said plaintiffs' complaint, or by any other means with said Plymouth Consolidated Gold Mining Company, or otherwise, pollute the waters flowing in said creek or flowing into the canal of plaintiff.

Wherefore these defendants, have fully answered, pray to be hence dismissed with their costs herein expended.

JOHN H. BOALT,
Attorney for Defendants Hayward, Hobart, and Montgomery.

Ans. of Hayward et al.

STATE OF CALIFORNIA, }
County of Amador, } ss:

E. L. MONTGOMERY, being duly sworn, deposes and says that he is one of the defendants named in the above and foregoing answer.

That he has read said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he beliefes to be true.

E. L. MONTGOMERY.

Subscribed and sworn to before me, this 15th day of April, A. D. 1885.

[SEAL.] J. W. SURFACE,
Notary Public in and for Amador County, Cal.

52 STATE OF CALIFORNIA, } ss:
County of —— }

——— being duly sworn, deposes and says that he is —— in the above-entitled action; that he has read the above and foregoing ——, and knows the contents thereof; that the same is true of —— own knowledge, except as those matters which are therein stated on —— information or belief, and as to those matters that he believes it to be true.

Subscribed and sworn to before me this — day of ——, 188–.

——— ———.

(Endorsed:) Service by copy admitted April 15th, 1885. McKune & George; att'ys for pl'ff. Filed April 15th, 1885. W. B. Hamilton, clerk, by W. W. Rhoades, deputy.

53 *Petition for Removal.*

In the Superior Court of the County of Sacramento, State of California.

AMADOR AND SACRAMENTO CANAL COMPANY, Plaintiff,

vs.

PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, A. HAYWARD, E. L. MONTGOMERY, and WALTER S. HOBART, Defendants.

To the honorable the superior court of the county of Sacramento, State of California:

The petition of the Plymouth Consolidated Gold Mining Company, defendant above named, respectfully shows:

That your petitioner is a defendant in the above-entitled action, and that said action was commenced and brought by said plaintiff above named in the superior court of the county of Sacramento, State of California, and the summons issued therein was served on your petitioner on the fourth day of February, A. D. 1885, and
54 that the answer of your petitioner to said complaint was duly filed on the fifteenth day of April, 1885, and the separate answer of the other defendants was duly filed on the same day, and that said cause has not yet been tried, and could not have been filed before the filing of this petition.

And your petitioner further shows that your petitioner is now, and was at the time of the commencement of said action above entitled, and ever since has been a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business in the city of New York, in said State of New York.

That said plaintiff was at the time of the commencement of said action, since has been, and is now a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business within said State of California.

That your petitioner is now and was at the time of the commencement of said action, and during all the times therein mentioned,

the sole owner and user of the two mills situated in Amador
55 county, in said State of California, particularly described in plaintiff's complaint filed in said action, and was during all said times, and still is, the only defendant (mentioned in said complaint) using the stream or creek in said complaint described as "Little Indian creek," and the only defendant using any water in or about said mills, and the only defendant discharging any water in said Little Indian creek.

Your petitioner further shows that the controversy in said suit above entitled is wholly between citizens of different States, and that your petitioner was at the time of the commencement of this suit, and still is, a citizen of the State of New York, and having its principal place of business in the city of New York, in said State of New York, and that said plaintiff, Amador and Sacramento Canal Company, was then, and still is, a citizen of the State of California, and having its principal place of business within said State of California.

That said defendants, Alvinza Hayward and E. L. Montgomery, are, as your petitioner avers on information and belief, now citizens of the State of California, and said defendant, Walter S. Hobart, is a citizen of the State of Nevada.

But your petitioner avers and shows to the court that in
56 the said suit above mentioned there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between your petitioner and said Amador and Sacramento Canal Company, and that said two corporations are the sole and only parties interested in said controversy.

That said defendants, Alvinza Hayward, E. L. Montgomery, and Walter S. Hobart, are not, nor is either of them, a necessary or proper party defendant in said action.

That said defendants, Alvinza Hayward, E. L. Montgomery, and Walter S. Hobart, and each of them, are nominal and formal parties defendant to said suit, and they, nor either of them, have any interest in the said controversy, and they nor either of them are actual, real, or necessary parties defendant, but are sham defendants sued in said action with your petitioner, as it avers on information and belief, with the object, purpose, intent, and design of endeavoring thereby to prevent the removal of said cause into the circuit court of the United States for the district of California by your petitioner, who is the real defendant therein.

That said Alvinza Hayward and Walter S. Hobart are stockholders and officers of your petitioner, to wit, two of the members
57 of its board of seven trustees, and they have not, nor has either of them, any interest in the said controversy other than as such officers or stockholders.

The said defendant, E. L. Montgomery, is the superintendent of the mines and mills of your petitioner, and has no interest whatever in said controversy.

That all the acts and grievances complained of and alleged to

have been done by said defendants, if any such were done, were the sole acts of your petitioner.

And your petitioner avers and shows that the real litigation herein is between said plaintiff and your petitioner, citizens of different States, as aforesaid.

And your petitioner further shows that it has not carried on or conducted any mining or milling business in connection with said defendants or with either of them.

And your petitioner further shows that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That your petitioner desires to remove this suit, before the trial thereof, into the circuit court of the United States, to be held in the district of California, in the ninth circuit, in pursuance of
58 the provisions of law as contained in the act of Congress, approved March 3d, 1875, entitled an "Act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and that it is ready and willing to give such good and sufficient security as is proper for its doing all acts and things required to be done upon the removal of the suit into the United States court, and it offers herewith a bond, with good and sufficient surety, in the penal sum of one thousand dollars, conditioned that your petitioner shall enter into the next circuit court of the United States, to be held in the district of California, in the ninth circuit, on the first day of its session, a copy of the record in this suit, and shall pay all costs that may be awarded by said circuit court if said circuit court shall hold that this suit was wrongfully or improperly removed thereto, and shall appear in said next circuit court, on the first day of its next session, and enter special bail in this suit, if special bail was originally requisite therein, and shall do such other acts as by the said act of Congress, approved March 3rd, 1875, are required to be done upon the removal of said suit into the said
59 United States circuit court.

And your petitioner shows that on the twenty-sixth day of March, A. D. 1885, this defendant, the said Plymouth Consolidated Gold Mining Company, duly directed and authorized the making of this petition and the removal of this suit, as herein prayed for, and on said last-named day, at the office of said company, in the city of New York, State of New York, the trustees of said company duly assembled and adopted a resolution in the words and figures following, to wit:

"Resolved, That E. L. Montgomery, superintendent, and John H. Boalt, attorney-at-law for this company (or either of them), be, and they hereby are, directed and empowered to take all necessary and proper steps, and to sign, execute, acknowledge, and file all necessary papers; to cause to be removed into the circuit court of the United States for the ninth circuit and district of California that certain action now pending in the superior court for the county of Sacramento, State of California, numbered 2199, and entitled 'Amador and Sacramento Canal Company *versus* Plymouth Gold Mining Com-

60 pany *et als.*,' and to that end to make and sign, in the name of this company, the proper petition, bond, and other papers."

A copy of said resolution duly authenticated is hereto annexed and marked Exhibit A.

Wherefore your petitioner prays that this petition and said bond may be accepted by this honorable court, and that this suit may be removed into the next circuit court of the United States for the ninth circuit and district of California, and that this court proceed no further in this action.

PLYMOUTH CONSOLIDATED GOLD MINING COMPANY,
By E. L. MONTGOMERY,
Its Superintendent and Attorney-in-Fact for this Purpose.
JOHN H. BOALT,
Attorney for Petitioner.
W. H. BEATTY AND S. C. DENSON,
Of Counsel.

61 EXHIBIT "A."

Resolved, that E. L. Montgomery, superintendent, and John H. Boalt, attorney-at-law for this company (or either of them), be, and they hereby are, directed and empowered to take all necessary and proper steps, and to sign, execute, acknowledge, and file all necessary papers to cause to be removed into the circuit court of the United States for the ninth circuit and district of California that certain action now pending in the superior court for the county of Sacramento, State of California, numbered 2199, and entitled "Amador and Sacramento Canal Company *versus* Plymouth Consolidated Gold Mining Company *et als.*," and to that end to make and sign in the name of this company the proper petition, bond, and other papers.

I do hereby certify that the above is a true and exact copy of a resolution as it appears of the minutes of this company, and which was passed unanimously at a special meeting of the board of trustees held here this 26th day of March, 1885.

[SEAL.] P. W. BEDFORD, *Secretary.*
PLYMOUTH CONSOLIDATED GOLD MINING CO.

62 STATE OF CALIFORNIA, *County of Amador*, } *ss:*

E. L. Montgomery, being duly sworn, deposes and says that he is an officer, to wit, the superintendent, of the Plymouth Consolidated Gold Mining Company, defendant, and petitioner above named; that he has read the above and foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

E. L. MONTGOMERY.

Subscribed and sworn to before me this 15th day of April, A. D. 1885.

[SEAL.] J. W. SURFACE,
Notary Public in and for Amador County, Cal.

(Endorsed:) Filed April 15th, 1885. W. B. Hamilton, clerk, by W. W. Rhoades, deputy.

63 *Undertaking on Removal.*

In the Superior Court of the County of Sacramento, State of California.

AMADOR AND SACRAMENTO CANAL COMPANY, Plaintiff,
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, A. HAYWARD, E. L. MONTGOMERY, and WALTER S. HOBART.

Know all men by these presents that the undersigned, The Plymouth Consolidated Gold Mining Company, defendant above named, as principal, and Wm. M. Lyon and W. R. Strong, as sureties, are held and firm- bound unto the Amador and Sacramento Canal Company, plaintiff above named, in the penal sum of one thousand dollars, the payment whereof, well and truly to be made unto the said Amador and Sacramento Canal Company, its successors or assigns, the said Plymouth Consolidated Gold Mining Company hereby binds itself, its successors and assigns, and said
64 Wm. M. Lyon and W. R. Strong, sureties above named, hereby bind themselves, their and each of their heirs, executors, and administrators, jointly and severally, firmly by these presents.

Yet upon these conditions: That the said Plymouth Consolidated Gold Mining Company having petitioned the superior court of the county of Sacramento, State of California, for the removal of a certain cause therein pending, to wit, the above-entitled cause, wherein said Amador and Sacramento Canal Company is plaintiff and said Plymouth Consolidated Gold Mining Company and A. Hayward, E. L. Montgomery, and Walter S. Hobart are defendants, to the circuit court of the United States in and for the district of California, ninth circuit:

Now, if the said Plymouth Consolidated Gold Mining Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto,
65 and it shall appear in said next circuit court, on the first day of its next session, and enter special bail in said suit, if special bail was originally requisite therein, and do such other appropriate acts as by the act of Congress, approved March 3rd, 1875, are required to be done, upon the removal of said suit into said United States court, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof said Plymouth Consolidated Gold Mining Company has caused these presents to be signed in its name, on this fifteeenth day of April, A. D. 1885, by John H. Boalt, its attorney at law and in fact, thereto duly authorized, empowered, and directed

by a resolution of its board of trustees, adopted and passed on the twenty-sixth day of March, A. D. 1885, at a meeting of said board of trustees duly assembled on said day at the office of said corporation, defendant, in the city of New York, State of New York, and said Wm. M. Lyon and W. R. Strong, sureties above named, have hereunto set their hands and affixed their seals, this 15th day of April, A. D. one thousand eight hundred and eighty-five.

PLYMOUTH CONSOLIDATED GOLD
MINING COMPANY,
66 By JOHN H. BOALT,
Its Attorney-at-Law and Attorney-in-Fact for this Purpose.

WM. M. LYON.
W. R. STRONG.

STATE OF CALIFORNIA, }
County of Sacramento, } *ss:*

WM. M. LYON and W. R. STRONG, the persons named in, and who subscribed, the foregoing bond as the sureties thereto, being severally duly sworn, each for himself deposes and says that he is worth the sum of one thousand dollars, the amount specified in said bond, as the penalty thereof, over and above his just debts and liabilities, exclusive of property exempt from execution and that he is a resident and householder within the State of California, and has property in the State of California liable to execution of the value of more than one thousand dollars.

WM. M. LYON.
W. R. STRONG.

Subscribed by Wm. M. Lyon and W. R. Strong in my presence, and sworn to by each of them before me, this fifteenth day of April, A. D. 1885.

[SEAL.] C. H. OATMAN,
Notary Public.

(Endorsed:) Filed April 15th, 1885. W. B. Hamilton, clerk, by W. W. Rhoades, deputy.

67 *Stipulation.*

In the Superior Court of the County of Sacramento, State of California.

AMADOR AND SACRAMENTO CANAL COMPANY, Plaintiff,
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY *et als.*, Defendants.

It is hereby stipulated and agreed that all the defendants in the above-entitled action may have 6 days from and after the 28th day of March, 1885, to move or plead in the above-entitled action.

Dated March 23d, 1885.

McKUNE AND GEORGE,
Attorneys for Plaintiffs.

(Endorsed:) Filed April 20th, 1885. Wm. B. Hamilton, clerk, by W. W. Rhoades, deputy.

68 *Cert- Copy Rules.*

In the Superior Court, County of Sacramento, State of California.

AMADOR AND SACRAMENTO CANAL COMPANY, Plaintiff, *vs.* PLYMOUTH CONSOLIDATED GOLD MINING COMPANY *et al.* } No. 2199.

Rule 8—Calendars to be kept by clerk.

The clerk shall keep two calendars for the use of the court—one to be called "the law calendar" and the other "the trial calendar."

Rule 9—The law calendar. How prepared.

The law calendar shall be heard on Monday of each week, and shall be made up on the Saturday preceeding by the clerk, and shall consist of such matters as he may be directed on or before 5 o'clock p. m. on Friday by any party to a proceeding to place thereon. Such direction shall be in writing, and shall contain the number and title of the cause, the names of the attorneys, the nature of the motion or proceeding, and the department to which the case belongs.

Rule 10—Notice of hearing of motions.

69 In the following cases placing the same on the law calendar shall be sufficient notice to the opposite party:

First. Argument of a demurrer to a complaint or answer, or motion in arrest of judgment, or for judgment on special verdict, or to set aside a nonsuit, or motion for judgment on agreed case, if the matter shall be placed on the law calendar before a law day intervenes, and after the demurrer is filed or motion is ripe for hearing.

Second. When notice of any other motion has been once duly given and the entry on the law calendar has been maintained without the intermission of a law day.

Any matter once on the law calendar shall not be continued thereon as of course, but if the entry of such matter is dropped for one law day two days' notice of its re-entry thereon shall be given.

Rule 12—The trial calendar. How prepared and when called.

On the first Monday in each month the trial calendar will be called and cases thereon set for trial.

Such calendar shall consist of such cases at issue of fact as the clerk shall be notified by the attorney of either party to place thereon.

70 Such notice shall be in writing, shall contain the number and title of the cause, the names of the attorneys, and the department to which the case is assigned by these rules, and shall be

delivered to the clerk before 5 o'clock p. m. on Friday preceding the calendar day.

The clerk, in making up the calendar, shall place the cases thereon as follows:

First. All cases to be tried in department No. one in the order in which notifications are received; and,

Second. All cases to be tried in department No. two in the same order.

Rule 6. Assignment of business to departments.

All cases on appeal from inferior courts to the superior court, all probate and all criminal proceedings (excepting cases of homicide), all proceedings in insolvency, all actions of forcible entry and detainer, and all special proceedings not otherwise provided for are assigned to department No. one.

All other cases are assigned to department No. two.

For sufficient cause shown, any case or proceeding may be transferred from one department to the other.

STATE OF CALIFORNIA, } *ss:*
County of Sacramento, }

71 I, Wm. B. Hamilton, county clerk of the said county of Sacramento, and *ex-officio* clerk of the superior court of said county, do hereby certify that the foregoing are full, true, and correct copies of rules 8, 9, 10, 12, and 6 of said superior court as the same went into effect September 5th, 1881, and that the same, ever since said last-named date, have been and now are in full force and effect as rules of said superior court.

Witness my hand — the seal of said superior court this 14th day of April, 1885.

[SEAL.] WM. B. HAMILTON,
County Clerk and ex-officio Clerk of said Superior Court.

(Endorsed:) Filed April 14th, 1885. Wm. B. Hamilton, Clerk.

72 *Stipulation.*

In the Superior Court of the County of Sacramento, State of California.

SACRAMENTO AND AMADOR CANAL COMPANY, Plaintiff,
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY *et als.*, Defendants.

Defendant, Plymouth Consolidated Gold Mining Co., may have until March 28th, 1885, to move or plead in above-entitled action, and the other defendants may have until same date.

Feb. 24, 1885.

McKUNE AND GEORGE,
Att'ys for Pl'ffs.

(Endorsed:) Filed April 20th, 1885. Wm. B. Hamilton, clerk, by W. W. Rhoades, deputy.

73 *Order of Removal.*

In the Superior Court of the County of Sacramento, State of California.

AMADOR AND SACRAMENTO CANAL COMPANY, Plaintiff,
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, A. HAYWARD, E. L. MONTGOMERY, and WALTER S. HOBART.

On reading and filing the petition and bond in the above-entitled action it is hereby ordered that no further proceedings be taken in this court, and that the above-entitled suit be, and the same is hereby, ordered and directed to be removed into the next circuit court of the United States for the ninth circuit, district of California.

Dated this — day of April, A. D. 1885.

T. B. McFARLAND, *Judge.*

[SEAL.] Attest: WM. B. HAMILTON, *Clerk.*

(Endorsed:) Filed April 15th, 1885. Wm. B. Hamilton, clerk, by W. W. Rhoads, deputy.

74 *Certificate to Transcript.*

OFFICE OF THE COUNTY CLERK,
COUNTY OF SACRAMENTO.

I, William B. Hamilton, county clerk of the county of Sacramento, and *ex-officio* clerk of the superior court held in and for said county and State aforesaid, hereby certify that I have compared the foregoing copies with the original papers and others therein and the endorsements thereon in the case of the Amador & Sacramento Canal Company against Plymouth Consolidated Gold Mining Company, A. Hayward, E. L. Montgomery, and Walter S. Hobart, case No. 2199, on file in my office, and that the same is a full, true, and correct copy of such originals and of the whole thereof.

Attest my hand and the seal of said court, this 29 day of April, A. D. 1885.

[SEAL.] WM. B. HAMILTON, *Clerk.*

75 *Stipulation.*

Stipulated — the copy of certain rules of the superior court herein contained were filed, at request of the plaintiff, without the knowledge or consent of the defendants or their attorneys, or either of them, and without any order of court directing the same.

McKUNE & GEORGE,
Atty's for Pl'ff.

(Endorsed:) U. S. circuit court. Transcript. Filed May 19, 1885. L. S. B. Sawyer, clerk.

76 *Notice of Motion to Remand.*

In the Circuit Court of the United States in and for the 9th Circuit, District of California.

AMADOR and SACRAMENTO CANAL COMPANY, Plaintiff,
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, A. HAYWARD, E. L. MONTGOMERY, and W. S. HOBART, Defendants.

To John H. Boalt, Esq., attorney for defendants:

Take notice that at the opening of said court on the 29th day of June, 1885, or as soon thereafter as the matter can be be reached, we will, on behalf of plaintiff, move said court to remand the said suit to the superior court in and for the county of Sacramento and State of California for further trial on the grounds and for the reasons following:

I.

77 That the said suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said circuit court.

II.

Because the said corporation, defendant, did not make or file its petition in said State court for the removal of said suit into the said circuit court either before or at the time at which said cause could be first tried, or before the trial thereof, and such petition was not filed within the time prescribed for it by section 3 of the act of Congress passed March 3d, 1875, entitled An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes, and because said petition was not filed until after there had been a trial upon the demurrer of the said corporation, defendant, to the plaintiff's complaint in said State court.

III.

Because the defendants did not all join in said petition for removal.

IV.

Because the defendants are not all residents or citizens of States other than California, and it does not appear that the parties defendants to said suit were or have been wrongfully joined as such.

V.

78 It does not appear from the record and papers on file in said circuit court that there is a controversy which is wholly between citizens of different States which can be tried and which

can be fully determined between them without involving necessarily a trial of the whole case as to all of the defendants.

On the hearing of said motion we will rely on and read in evidence—

1. The transcript and record on file in said circuit court in said cause.

2. Answer of the plaintiff to the petition of the corporation defendant for a removal herewith served.

3. Affidavits of J. H. McKune, W. F. George, and Jennie B. Ritter herewith served; and

4. Also offer oral evidence.

Respectfully, McKUNE AND GEORGE,
Att'ys for Plaintiff.

(Endorsed:) Filed June 17, 1885. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

79 At a stated term, to wit, the July term, A. D. 1885, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 27th day of July, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Cert. Copy — Order.

AMADOR AND SACRAMENTO CANAL COMPANY
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY *et al.* } No. 3694.

This cause, heretofore argued and submitted to the court for consideration and decision upon the motion to remand same to the superior court of the county of Sacramento, State of California, having been duly considered it is ordered that said motion be, and the same hereby is, granted, and the above-entitled cause remanded to said superior court with costs. It is further ordered that a stay of proceedings herein be granted for five days.

80 (Endorsed.)

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court, this 27th day of July, A. D. 1885.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Filed July 27, 1885.

L. S. B. SAWYER, *Clerk.*

81 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

AMADOR AND SACRAMENTO CANAL COMPANY
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY *et al.*

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the motion roll in the therein entitled action.

Witness my hand and the seal of said circuit court, this 27th day day of July, A. D. 1885.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Motion roll. Filed July 27, 1885. L. S. B. Sawyer, clerk.

Order Allowing Appeal.

82 At a stated term, to wit, the July term, A. D. 1885, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco on Friday, the 31st day of July, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Lorenzo Sawyer, circuit judge.

AMADOR AND SACRAMENTO CANAL COMPANY
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY *et al.*

On motion of J. H. Boalt, Esq., of counsel for the defendants, it is ordered that an appeal from the order made and entered herein remanding the above-entitled cause to the superior court of
83 the county of Sacramento, State of California, to the Supreme Court of the United States, be, and the same hereby is, allowed, and that a certified transcript of the pleadings, stipulations, and proceedings be forthwith transmitted to the Supreme Court of the United States upon the appellant giving a bond in the sum of five thousand dollars.

84 *Bond on Appeal.*

In the Supreme Court of the United States.

AMADOR AND SACRAMENTO CANAL COMPANY, Appellee,
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, A. HAYWARD, and E. L. MONTGOMERY and WALTER S. HOBART, Appellants.

Know all men by these presents that we, William Sharon and

Walter E. Dean, are held and firmly bound unto Amador and Sacramento Canal Company, the above-named appellee, in the sum of five thousand dollars, gold coin of the United States of America, to be paid to said Amador and Sacramento Canal Company, its successors or assigns; to which payment, well and
85 truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

In witness whereof we have hereunto set our hands and affixed our seals, this thirty-first day of July, A. D. 1885.

The condition of this obligation is such that whereas the above-named Plymouth Consolidated Gold Mining Company has taken an appeal to the Supreme Court of the United States to reverse the order made and rendered by the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, in the cause entitled "Amador and Sacramento Canal Company, plaintiff, *versus* Plymouth Consolidated Gold Mining Company, A. Hayward and E. L. Montgomery and Walter S. Hobart, defendants," (No. 3594,) remanding said cause to the superior court of the county of Sacramento, State of California, which said order was filed
86 and entered of record in said circuit court on the twenty-second day of July, A. D. 1885:

Now, therefore, if the above-named Plymouth Consolidated Gold Mining Company shall prosecute its said appeal to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WM. SHARON. [SEAL.]
W. E. DEAN. [SEAL.]

Signed, sealed, and delivered in the presence of—
EDW'D CHATTIN.

UNITED STATES OF AMERICA, }
District of California, } *ss:*

William Sharon and Walter E. Dean, being duly sworn, each for himself, says: That he is a householder within the district aforesaid and that he — worth the sum of five thousand dollars in gold coin of the United States of America, exclusive of property
87 exempt from execution, and over and above all his just debts and liabilities.

WM. SHARON.
W. E. DEAN.

Subscribed and sworn to before me, this 31st day of July, 1885.
[SEAL.] EDW'D CHATTIN,
Notary Public.

Endorsed: The form of the within bond and the sufficiency of the sureties thereon is hereby approved. (Signed) Lorenzo Sawyer, U. S. circuit judge, 9th circuit. Filed July 31, 1885. L. S. B. Sawyer, clerk.

88 In the Circuit Court of the United States for the District of California.

AMADOR AND SACRAMENTO CANAL COMPANY
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, A. HAYWARD and E. L. MONTGOMERY and WALTER S. HOBART.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, do hereby certify the foregoing eighty-seven written pages, numbered from 1 to 87, inclusive, to be a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the tran-

89 script on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said circuit court this 25th of August, A. D. 1885.

[The Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER, *Clerk.*

90 UNITED STATES OF AMERICA, *ss:*

To Amador and Sacramento Canal Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1885, pursuant to an order made by the circuit court of the United States, ninth circuit, district of California, allowing an appeal from an order remanding a cause, wherein Plymouth Consolidated Gold Mining Company, A. Hayward, E. L. Montgomery, and Walter S. Hobart are defendants and appellants and you are plaintiff and appellee, to show cause, if any there be, why the said order remanding the said cause mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States, ninth circuit, this 31st day of July, A. D. 1885, and of the Independence of the United States the one hundred and tenth.

[The Seal of the Circuit Court, District of Cala.]

LORENZO SAWYER,
United States Circuit Judge, Ninth Circuit.

91 Due service of the within citation admitted August 22, 1885.

McKUNE & GEORGE,
Attorneys for Plaintiff & Appellee.

[Endorsed:] 3694. Original. In the Supreme Court of the United States. Plymouth Consolidated Gold Mining Company *et al.*, def'ts and appellants, *vs.* Amador and Sacramento Canal Company, pl'ff and appellees. Citation. Filed August 22, 1885. L. S. B. Sawyer, clerk.

92 In the Circuit Court of the United States, Ninth Circuit, District of California.

AMADOR AND SACRAMENTO CANAL COMPANY, Plaintiff,
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, A. Hayward, E. L. Montgomery, and Walter S. Hobart, Defendants. } No. 3694.

Be it remembered that on this 20th day of July, A. D. 1885, the motion of above-named plaintiff to remand the above-entitled cause to the superior court of the county of Sacramento, State of California, from which said last-named court said cause had been removed to said circuit court on the petition of said defendant, Plymouth Consolidated Gold Mining Company, coming on regularly to be heard on the said petition of said defendant, the transcript of the record in said superior court, and said motion to remand. After argument of counsel the court, having considered said motion on the 27th day of July, A. D. 1885, rendered its decision on said motion and
93 made and entered an order in said cause remanding the said cause to said superior court of the county of Sacramento, State of California.

Which said decision and order is in the words and figures following, to wit:

At a stated term, to wit, the July term, A. D. 1885, of the circuit court of the United States of America, of the ninth judicial circuit in and for the district of California, held at the court-room in the city and county of San Francisco, on Monday, the 27th day of July, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Lorenzo Sawyer, circuit judge.

AMADOR AND SACRAMENTO CANAL COMPANY
vs.
PLYMOUTH CONSOLIDATED GOLD MINING COMPANY. *et al.* } No. 3694.

This cause, heretofore argued and submitted to the court for consideration and decision upon the motion to remand same to the superior court of the county of Sacramento, State of Cali-
94 fornia, having been duly considered, it is ordered that said motion be, and the same hereby is, granted, and the above-entitled cause remanded to said superior court with costs. It is further ordered that a stay of proceedings herein be granted for five days.

To which decision and order, so made and entered, said defendant, Plymouth Consolidated Gold Mining Company, by its counsel, then and there duly excepted. And defendant, Plymouth Consolidated Gold Mining Company, now assigns as reasons for its exception to said decision and order remanding said cause the following:

That said court erred in granting said motion and remanding said cause to said superior court of the county of Sacramento, State of

California, and in not overruling said motion and retaining said cause for trial in said circuit court.

Wherefore said defendant prays that said order remanding said cause to said superior court of the county of Sacramento, State of California, for trial, be reversed, and said cause retained in said circuit court of the United States, ninth circuit, district of
95 California, for trial.

JOHN H. BOALT,
Attorney for Defendant.

Endorsed on cover: California C. C. U. S. No. 949. The Plymouth Consolidated Gold Mining Company *et al.*, appellants, *vs.* The Amador and Sacramento Canal Company. Filed September 14, 1885.

118 26x

APR 22 1886
JAMES H. McKENNEY,

No. 949.

SUPREME COURT

OF THE

UNITED STATES.

THE PLYMOUTH CONSOLIDATED GOLD MINING COMPANY ET AL.,

Appellants,

VS.

THE AMADOR and SACRAMENTO CANAL COMPANY,

Appellee.

BRIEF FOR APPELLANTS.

JOHN H. BOALT,
Attorney for Appellants.

California, and in not overruling said motion and retaining said cause for trial in said circuit court.

Wherefore said defendant prays that said order remanding said cause to said superior court of the county of Sacramento, State of California, for trial, be reversed, and said cause retained in said circuit court of the United States, ninth circuit, district of
95 California, for trial.

JOHN H. BOALT,
Attorney for Defendant.

Endorsed on cover: California C. C. U. S. No. 949. The Plymouth Consolidated Gold Mining Company *et al.*, appellants, *vs.* The Amador and Sacramento Canal Company. Filed September 14, 1885.

118-264

No. 949.

SUPREME COURT

OF THE

UNITED STATES.

THE PLYMOUTH CONSOLIDATED GOLD MINING COMPANY ET AL.,

Appellants,

vs.

THE AMADOR and SACRAMENTO CANAL COMPANY,

Appellee.

BRIEF FOR APPELLANTS.

JOHN H. BOALT,
Attorney for Appellants.

IN THE

Supreme Court

OF THE

UNITED STATES,

THE PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, ET ALS., *Appellants*,

vs.

THE AMADOR AND SACRAMENTO CANAL COMPANY, *Appellee.*

No. 949.

Statement of Facts.

This is an appeal from an order remanding a cause to the State Court.

A question having arisen as to whether the error complained of was properly reviewable on appeal or by writ of error, both methods of procedure have been, for sake of precaution, employed; and besides this appeal, there is a writ of error pending relating to the same order.

The appeal involves two questions: *First* was the case such an one as is properly removable under the act of March 3d, 1875; and *Second* was the removal made in time?

To avoid confusion, the facts essential to a determination of these questions will be stated separately.

I.

NATURE OF THE SUIT.

The plaintiff is a California corporation.

The defendant Plymouth Consolidated Gold Mining Company is a New York corporation, and of the other defendants, W. S. Hobart is a citizen of Nevada, A. Hayward and E. L. Montgomery are citizens of California.

The plaintiff alleges that it is the owner of a certain canal or ditch in the complaint described; that the defendant corporation is the owner of two certain gold quartz mills at Plymouth, Amador County, California, and also of a certain valley, through which runs a creek which intersects the canal of plaintiff; that the *defendants* have used the mills in the business of crushing gold-bearing quartz rock with large quantities of water, taken from the Moquelumne river and have used the creek as a dumping place for tailings and other debris formed by the working of said mills; that these tailings and debris have flowed through the creek into plaintiff's ditch, and have deposited therein large quantities of sand, silt, etc., raising the bed of the ditch and obstructing and damaging it; that plaintiff has sought to prevent the injury by constructing dams, but with partial success only, and has been compelled at divers times to employ large forces of laborers to clear the canal of sand, and has sustained other injuries; that by reason of these wrongful acts plaintiff has sustained damages in the sum of of $25,000.00; that defendants threaten to continue their wrongful

acts; that defendants also, by means of mining in the creek referred to, pollute the waters so flowing to the canal of plaintiff. Wherefore plaintiff prays for an injunction and for $25,000.00 damages.

The defendants answered separately. Defendant corporation Plymouth Consolidated Gold Mining Company admits its ownership of the mills mentioned in the complaint, but denies that it has used or does use the same or either of them in connection with the other defendants impleaded with it, and avers that it has used and uses said mills for its own sole and exclusive use and benefit, and without any connection or combination with the other defendants or either of them, and that it has no connection or relation with them or either of them, except that defendants Hayward and Hobart are two of its seven directors, and defendant Montgomery is the Superintendent of its mines and mills. The answer then presents other defences and among them an affirmative defence consisting of certain alleged agreements and understandings between the plaintiff and the prede-

cessor in interest of the corporation defendant, by reason of which it claims to have been licensed to discharge its tailings and debris in manner and form as complained of.

The other defendants in their answer deny the allegations of the complaint relating to them, and deny that they or either of them, in connection with corporation defendant or otherwise have committed any of the alleged wrongful acts in the complaint set forth.

The petition for removal shows that the corporation defendant was and is the sole owner and user of the two mills mentioned in the complaint and the only defendant using the stream or creek mentioned in the complaint, and the only defendant using any water in said mills, or discharging water into said creek. It then sets up the citizenship of the parties and avers that there is in the suit a controversy wholly between citizens of different States, to wit: between plaintiff and defendant corporation, and between them only; that the other defendants are not, nor is either of

them, a necessary or proper defendant to the suit, and that they are nominal parties without any interest in the controversy; that they are sham defendants, sued with the petitioner in said action with the design of preventing the removal of the cause into the Federal Court by the petitioner, the real defendant therein; that all the acts and greivances complained of; were, if done at all, the sole acts of the petitioner, with other allegations to the like effect.

II

TIME OF REMOVAL.

Complaint filed in Superior Court of the County, of Sacramento, January 13th, 1885. (Transcript, folio 8).

Complaint served in Amador County on defendant corporation February 5th, 1885, and on defendant Montgomery February 4th, 1885 (folios 11 and 12), and in San Francisco City and County on defendant Hayward February 14th, 1885 (folio 9).

Defendant Hobart was never served at all. The Sheriff's return, which was filed April 13th,

1885 (folio 14), shows that he was unable to find Hobart, but learned that he was then in Mexico (folio 10).

By the terms of the summons (folio 14) all the defendants served had thirty days to answer. This gave defendant Plymouth Con. G. M. Co. until March 7th, Montgomery until March 9th, and Hayward until March 16th. These last-named defendants had their time to plead extended by stipulation until April 3d, 1885 (folios 72 and 67).

Hobart first appeared April 3d, 1885, when a demurrer was filed for him and defendants Hayward and Montgomery, and a separate demurrer for defendant corporation.

The rules of the State Court provided that the law calendar should be heard on Monday of each week, and should be made up of such matters as the Clerk had been directed to place on it by any party to the proceeding before five o'clock of the preceding Friday (folio 68).

Monday, April 6th, the demurrers filed the preceding Friday were called up and the defendants withdrew their demurrers and were allowed ten days to file answers (folio 23).

Separate answers were filed April 15th, 1885 (folios 41 and 51).

On the same day the petition for removal was filed (folio 62) and the order of removal made and filed (folio 73).

After the removal of the cause to the Federal Court upon motion of counsel for plaintiff the cause was remanded to the State Court, and from that order this appeal was taken.

ASSIGNMENT OF ERRORS.

I.

The Court erred in granting the motion to remand said cause, and in not overruling said motion, and retaining said cause for trial in said Court:

1st. Because the record shows that said cause was removable under the Act of Congress approved March 3d, 1875, entitled an "Act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State Courts, and for other purposes."

2d. Because the record shows that the individual defendants joined as defendants with the corporation defendant in said action were sham defendants.

ARGUMENT.

I.

The Petitioner in the State Court had the right to remove the cause into the Federal Court.

The nature of the action can only be ascertained from the pleadings and petition for removal.

These conclusively show that the controversy was one wholly between citizens of different States, to wit: between the plaintiff, a California corporation, and the defendant, the Plymouth Consolidated Gold Mining Company, a New York corporation.

The complaint alleges facts which, taken together, may be assumed to constitute trespass on the case. The place where the alleged wrongful acts are alleged to have been committed is charged to be the property of the corporation defendant. The corporation is averred to be the owner of the mills, and to have possession of the valley into

which the the tailings are discharged. No connection or combination is alleged between the corporation defendant and the individual defendants. After the preliminary allegations showing the property belongs to the corporation defendant alone, the individual defendants are made such by the simple process of putting the word defendant in the plural.

The answer of the corporation defendant meets the charges of the complaint and satisfactorily accounts for the cause of action contained in it. The substantial acts complained of are admitted and the defence of license put forward. The defence is, in short, confession and avoidance.

But the corporation defendant denies that any of these acts have been committed by it in connection or combination with the other defendants, or either of them, and avers that the mills have been run and the water used by the corporation alone, and for its sole and exclusive benefit.

The individual defendants deny that they, or either of them, have or has committed any of the acts complained of, either in connection with the corporation defendant or otherwise, or at all.

The petition denies that the individual defendants have any interest in the controversy, and avers on information and belief that they are *sham defendants, and sued with it for the express purpose and intent of attempting to prevent the removal of the cause by it into the Federal Court.* (Transcript, folio 56.)

It is evident that Congress intended that the truth of the allegations necessary to show a case for removal should be deemed admitted until they were directly attacked in the Federal Court by plea or otherwise. The sufficiency of these allegations is, of course, quite a different matter, but it was necessary to assume the verity of the facts alleged, because otherwise a removal would be practically impossible. Accordingly, the Circuit Court is given power to compel the State Court to make return of the record and to complete the removal, and this without examining into the truth of the facts alleged in the petition so as to determine whether a diversity of citizenship or other cause of removal therein set forth be well founded or not.

But to prevent any injury which might arise from this necessary omission to first pass upon the

verity of the facts alleged as a cause for removal, Congress provided, *first*, That the removing party should give a bond conditioned to pay all costs in the event that the Circuit Court should determine that the cause was wrongfully or improperly removed; and, *secondly*, That at any time after such removal, when it shall appear that the suit does not really and substantially involve a controversy within the jurisdiction of the Federal Court, or that it has been collusively or improperly removed, the Court shall proceed no further, but shall dismiss or remand the cause and make such order as to costs as shall be just.

This provision of the Statute has been several times passed upon by this Court, and the Circuit Judges have been here more than once admonished to remand or dismiss a cause upon their own motion when at any time during the proceedings it appears to have been wrongfully or improperly brought before the Federal Court.

We have, then, an effective and consistent system by which removals may be made, and if made improperly, the injury done by them may be compensated. When the petitioner makes out a sufficient cause for removal, the essential facts al-

leged by him will be for the purpose of removal deemed to be true ; but if, after the case has been removed to the Circuit Court, it turns out that the facts are not true, then the cause will be at once remanded or dismissed, and the petitioner or his securities will be compelled to pay all the costs caused by the removal.

We turn now to the case at bar.

Certainly, if this suit had been commenced by the plaintiff corporation against the defendant corporation alone, if the letter "s" had been dropped from the word defendants in the complaint, then there could be no question whatever as to the right of the corporation defendant to remove the cause into the Federal Court.

The question now arises. can a plaintiff deprive a defendant of the right of removal by adding other and fictitious defendants who are citizens of the same State with plaintiff ?

If he can. that is an end to the right of removal. The practice would be so easy and simple that it must immediately commend itself to universal adoption. The plaintiff unites with the

real defendant one or more fictitious defendants and retains them in the cause for a short time, until it has become too late to remove the cause, and then dismissing as to the fictitious defendants he proceeds to try in the State Court "a controversy wholly between citizens of different States" in spite of all efforts of the real defendant to exercise the right of removal which the statute gives him. He has thus succeeded by the simplest of procedures, in absolutely nullifying an Act of Congress. He has robbed his adversary of a right which the National Legislature has taken the greatest pains to preserve inviolate.

The proposition refutes itself, and I shall assume that this Court will not so rule when such a case is properly presented.

The requirements for such presentation are not far to seek.

1. The facts must clearly and fully appear in the petition, and

2. The petition must be consistent with the petitioners pleadings and with the admitted facts of the case.

It cannot be necessary that the petition should be consistent with *all* the pleadings, because if it were, it would be only necessary to aver in the complaint that the contending parties were all citizens of the same State, and this would avoid the possibility of removal thereafter. But it *is* necessary that the petition should be consistent with the petitioners' pleadings, for otherwise the petition might make out a case for removal by simply stating a conclusion of law while the petitioner's answer might disclose facts which would demonstrate that there was no just cause for it. So, also, and for the same reason it must be consistent with facts admitted by failure to deny allegations in the adverse pleadings, or by stipulation of counsel, or by testimony when the case has advanced to a trial.

It is respectfully submitted that these requirements have been fully complied with in the case at bar, and that a case for removal has here been fully made out.

The petition distinctly alleges that the controversy is wholly between the plaintiff and petitioner, and that the acts and grievances complain-

ed of, if any such were done, were the sole acts of the petitioner, and that neither of the other defendants is an actual real or necessary party, but that they are all sham defendants and have been sued with the petitioner for the purpose of depriving it of its right of removal.

If these allegations are true, then certainly petitioner has made out its case; but as we have seen, these allegations being essential to a removal, like allegations of a diverse citizenship, will be deemed to be true (unless contradicted by the petitioner's pleadings or by admitted facts) until otherwise determined in the Federal Court. The petitioner makes them at its peril. If the other defendants are not sham, if either or any of them properly belongs in the case, then the Circuit Court will remand the cause as soon as this appears, and make a just order as to costs against the petitioner who has thus wrongfully removed its cause. If, on the other hand, the allegations are true and plaintiff is really seeking in this way to deprive the petitioner of its right of removal, it would be monstrous thus to enable it to profit by its own wrong.

Arapahoe Co. vs. *Kansas P. R. Co.*, 4 Biss., 277.

Central Trust Co. vs. *Wabash, St L. & P. R. Co.*, 25 Fed. Rep., 69.

Clarkhuff vs. *Wisconsin I. & N. R. Co.*, 26 Fed. Rep., 7.

The petition is entirely consistent with the petitioners answer, and with the answer of the other defendants as well. It is even consistent with the complaint itself in so far as it satisfactorily accounts for the cause of action therein stated, and shows that the participation of the other defendants which it denies was at least unnecessary and improbable.

In both respects this case materially differs from the case of *Pirie* vs. *Tvedt*, (115 U. S., Rep. 41) on the authority of which the order of remand here appealed from was made. That case was then recently decided and neither Court nor counsel had access to the transcript. *Pirie* vs. *Tvedt* was an action for malicious prosecution brought by plaintiffs, citizens of the State of Minnesota, against Pirie, Scotts and McLeish citizens of the State of Illinois, and their attorneys, Wood & Sti-

les, citizens of the State of Minnesota. The complaint charged that defendants had maliciously conspired together, and without proper cause had brought suit and caused a writ of attachment to be issued and levied upon the stock of goods of plaintiffs to their great damage, etc.

Wood & Stiles, the attorneys, answered separately, and admitted that they had brought the suit and caused the attachment to issue, but they averred that they had done so under special instructions and at the special instance and request of the other defendants. Pirie, Scotts and McLeish in their answer admitted that they had caused the suit to be brought and attachment to be levied, but justified on grounds immaterial here.

Pirie, Scotts and McLeish removed the cause into the Federal Court. Their petition, after setting up the citizenship of the parties, simply alleged that there was in the action a controversy wholly between citizens of different States, which could be fully determined between them. The case went to trial before a jury in the Federal Court. At the end of plaintiff's case, the Court ordered a verdict

in favor of Pirie, Scotts and McLeish, the non-resident defendants, on the ground that they were not responsible for what their local attorneys had done without their knowledge or direction. This left the cause one between citizens of the same State. The Court set aside the verdict and remanded the cause.

The difference between the two cases is at once apparent. The complaint here makes no allegations of conspiracy or confederation between the defendants. It does not show any connection whatever between them. The answers here of both resident and non-resident defendants deny that the resident defendants had anything to do with the acts complained of. In the Pirie case the answer of the resident defendants admitted that they had personally committed the acts complained of, but justified on the ground that these acts were under special directions from and at the express instance and request of the non-resident defendants. In the end, the case went off on this point, the Court finding to the contrary that the non-resident defendants had not known of or directed the acts complained of. As to the petition, the divergence is still wider. There was no suggestion

there that the non-resident defendants were the only real defendants, or that the resident defendants were sham parties, impleaded for the purpose of preventing a removal. On the contrary, it was impliedly admitted that all the defendants were proper parties to the action, but it was claimed that since the non-resident defendants had a different defence from that of the resident defendants, therefore, there was a controversy wholly between citizens of different States. On appeal, this Court held that there was but a single cause of action, and that was the alleged malicious prosecution of the plaintiffs by all the defendants acting in concert, and that the plaintiffs might have sued each defendant separately or all jointly, and had a right to elect which course to pursue. The decision must be taken in connection with the facts of the case decided, and it is certainly very far from deciding that a plaintiff may join sham parties as defendants in his suit for the purpose of preventing a removal, and then afterwards, when the sham defendants answer, denying any connection with the suit, and the real defendant answers, confessing and avoiding the acts complained of, no removal can be made, because, in one, sense all the answers are defences in the same controversy.

I do not place the right of the corporation defendant in this case to remove the cause upon the ground that its defence is a separate defence from that of the other defendants, nor do I claim that a separate defense necessarily makes a separable controversy. There might easily be a case in which, as in *Hyde* vs. *Ruble*, 104 U. S., there are several defendants having separate defences to the same action, and yet no one of them might have the right of removal because no one of them had a separable controversy.

The point in this case is that there is *but one real controversy and but one real defendant.* The other defendants are *sham.* The petitioner here has averred the fact so to be, and has supported this averment by a sufficient bond, and until this averment is overthrown in the Circuit Court it stands as true.

The right of this corporation defendant to remove the cause rests squarely on this proposition, and so far as I have been able to learn this precise point has never yet been presented to this Court.

There remains one other point to be considered before leaving this branch of the case.

Both the petition and answers admit that the individual defendants are officers of the corporation defendant. Hayward and Hobart are two of its seven Directors, and Montgomery is the Superintendent of its mines and mills.

It may be claimed that this gave the plaintiff the right to join them with the corporation defendant in this suit, and that the omission to allege their relation to the corporation in the complaint is made good by the admission in the answer.

But even if this were so, the plaintiff could not make use of the admission without the qualification with which it is accompanied. This is, that the defendants Hayward and Hobart have no interest in the controversy, except as officers or shareholders, and the defendant, Montgomery, has no interest whatever, and that the acts and grievances complained of, if any such were done were the sole acts of the petitioner.

This is a suit in equity. The prayer of the complaint is that the defendants, "and each of them, their agents, servants and employees be

enjoined," etc. An injunction against the corporation, if obtained, would reach all the other defendants as officers or agents of the corporation.

It has been repeatedly held that in a suit of this kind the officers or agents of a corporation are merely nominal parties, and the fact that their residence is the same as that of plaintiff will not defeat a removal.

Hatch vs. *Chicago, R. I. & P. R. R. Co., et als.*, 6 Blatch. 105.

National Bank of Lyndon vs. *Wells River Manufacturing Co., et als.*, 7 Fed. Rep., 750.

Mayor, etc., of *N. Y.* vs. *N. J. Steamboat Transfer Co., et als.*, 24 Fed. Rep., 817.

See also *Morton* vs. *Superior Ct. of Tulare Co.*, 65 Cal., 496.

If it is suggested that while the suit at bar is primarily a suit in equity, still the complaint also partakes of the nature of an action at law for

damages for an alleged trespass, and that in the action at law the officers of the corporation might be proper parties, although not proper on the equitable side, the reply is, *first*, their official position would not necessarily make them proper parties, and if as officers or agents of the corporation they had committed any specific acts which would have rendered them liable, it was the duty of the plaintiff to have so alleged them so that they could have been met in the answer or petition. The mere fact that a corporation cannot perform any act except through natural persons does not make all of its officers or agents responsible for its wrongful acts. It is familiar law, and is distinctly laid down in the Civil Code of California, Section 2351, that "a sub-agent lawfully appointed represents the principal in like manner with the original agent, and the original agent is not responsible to third persons for the acts of the sub-agent."

As the case now stands the allegations of the petition, that these defendants are sham parties, and that the corporation is the only real defendant, are sufficient to hold the case, at least until the contrary

is shown, and, *finally*, even if we are all wrong in this and it should be held that there is here an action at law as well as a suit in equity, and that the individual defendants are necessary parties to the former, although not to the latter, then it follows that there is here a separable controversy, to-wit: the suit in equity, and in this the plaintiff and the corporation defendant are the only real parties, and the case is removable under the second clause of Section 2 of the Act of 1875.

Frazer vs. *Jennison*, 106, U. S. Rep., 191.

I.

Time of removal.

The case was removed in time.

I here quote Section 73 of the Code of Civil Procedure of the State of California:

"SEC. 73. The Superior Courts shall be "always open (legal holidays and non-judicial "days excepted), and they shall hold their ses- "sions at the county seats of the several counties "or cities and counties respectively. They shall

"hold regular sessions on the first Mondays of "January, April, July and October, and special "sessions at such other times as may be prescrib- "ed by the Judge or Judges thereof; provided, "that in the City and County of San Francisco "the presiding Judge shall prescribe the times of "holding such special sessions."

This Section has been construed by Hon. Circuit Judge Sawyer, in the case of *McNaughton* vs. *S. P. Coast R. R. Co.*, 10 Saw., 111. He there holds that "the regular sessions of the Su- "perior Courts, commencing at regularly appoint- "ed periods, are substantially terms. They are "terms, at least in my judgment within the reason "and meaning of the Act of Congress, and this "construction will be adhered to in this Circuit "until overruled in the Supreme Court."

He adds, however, "it is by no means certain "that special sessions provided for in the Act the "and in those cases where monthly calendars are "provided for by rule, such special and monthly "sessions would not also be held to be terms "within the meaningof the Act of Congress."

The question was not essential in the case then decided, but it is believed that there is a very serious objection to giving to the statute the interpretation last suggested by the learned Judge of this Circuit. For under the statute it is as competent for the Judge of the Superior Court to prescribe the time for a special session by a simple order as by a settled rule. He may make this order at any time. The end of one term and the beginning of another would thus be solely within the mind of the Judge. Suppose now that litigants having the right to remove a cause had made the necessary preparations for so doing and this with proper dispatch, and then on coming into Court in the morning should discover that the Judge had of his own motion ended one term and begun another during the night. The construction established as the rule of this Circuit, that the *regular* sessions are the terms contemplated by the Act of Congress is certainly far more consistent with an orderly administration of the laws.

But even assuming that the monthly calling of the trial calendar, as established by the rule of

Court (folio 70) was the beginning of a term, still the case was removed in time.

For the first Monday of March, 1885, was Monday, the 2d day of March of that year. On that day the calendar of causes at issue was called. But the time for the defendant corporation to answer did not expire until the 7th of that month; defendant Montgomery's time did not expire until the 6th; defendant Hayward's time did not expire until the 16th, and defendant Hobart had not been served at all. It is true that the parties served were given additional time by stipulation, but under no aspect of the case could this have prejudiced the plaintiff, or retarded the time of trial. For since the plaintiff had not made service of his summons, in time for the March calendar, the case could not have been called for trial on the calendar for that term. Nor would it have been in time for the April term but for the voluntary appearance of the defendant, Hobart, on the 3d day of April. The case was removed on the 15th day of April, which was in ample time, no matter whether the terms of Court are considered as quarterly or monthly.

But it is argued that since the demurrers, filed on the 3d day of April, were called upon the 6th, and then withdrawn by defendants, the removal is too late, because the petition to remove was not filed before this time.

But it will not be seriously contended that a case is tried every time it is called for trial, and certainly it cannot be tried when demurrers are placed on a law calendar for hearing, and withdrawn before they are heard. The statute requires the case to be removed before *the trial*, and it was complied with in this case. *Maloy vs. Duden et als.*, 25 Fed. Rep., 673.

Nor can the inference be drawn, that but for the extension of time to the defendants served, their demurrers would have been filed, and heard before the April term. The inference is just the other way. It is obvious enough from the facts shown in the record, that plaintiff sought to prevent any removal by calling up the demurrers for trial before the removal could be effected, and that the demurrers were sacrificed by defendants, rather than give up this right to remove.

The demurrers were both general and special. To try them in the State Court was therefore to try the whole case, and under repeated decisions of this Court, such trial would have forfeited the right of removal. The corporation defendant, the only real defendant, desired to remove the cause into the Federal Court; the individual defendants, who were merely nominal defendants, certainly had no interest in preventing the corporation, of which they were officers or stockholders, from exercising its right of removal. The same counsel appeared for all the defendants. Under these circumstances it would be highly unreasonable to infer that the defendants, or any of them, would have pursued a course which was certain to defeat the object aimed at, and especially when it is considered, that rather than surrender this object, the demurrers originally intended for trial in the Circuit Court, were voluntarily withdrawn, and the defects in the complaint pointed out in them were waived.

The defendants in this case were scattered from New York to Mexico, as the record shows. Considering this fact, and that the plaintiff never pro-

cured any service at all upon defendant Hobart, and that but for his voluntary appearance, the case might not have been at issue until this time, the plaintiff certainly has no cause to complain of delay.

Counsel for appellee has made a motion to affirm the order appealed from on the ground that the question on which it depends is so frivivolous as not to need further argument, and has submitted his motion in the same brief in which he submits the question of removal.

Counsel for appellant on his part, also submits the motion without further comment.

Respectfully submitted.

JOHN H. BOALT,

OF COUNSEL FOR APPELLANT.

118-264

RECEIVED
APR 22 1886
JAMES H. McKENNEY,

No. 950.

SUPREME COURT

OF THE

UNITED STATES.

THE PLYMOUTH CONSOLIDATED GOLD MINING COMPANY ET AL.,

Plaintiff in Error,

vs.

THE AMADOR and SACRAMENTO CANAL COMPANY,

Defendant in Error.

BRIEF for PLAINTIFF in ERROR.

JOHN H. BOALT,
Counsel for Plaintiff in Error.

IN THE

Supreme Court

OF THE

UNITED STATES,

THE PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, ET AL.,
Plaintiff in Error,
vs.
THE AMADOR AND SACRAMENTO CANAL COMPANY,
Defendant in Error.

No. 950.

The writ of error in this case was taken from the same order appealed from in case 949, and for the same errors assigned in the brief on file in that

case. By stipulation the record in this case has not been printed.

The Court is respectfully requested to accept and consider the brief, (with assignments of error) on file in case 949, in passing upon this case, and the same is submitted upon said brief.

Respectfully,

JOHN. H. BOALT,

COUNSEL FOR PLAINTIFF IN ERROR.

118-264

FILED
MAR 25 1886
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 949.

PLYMOUTH CONSOLIDATED GOLD MINING COMPANY,
APPELLANT,

v.

AMADOR AND SACRAMENTO CANAL CO.,
APPELLEE.

BRIEF FOR APPELLEE and NOTICE OF MOTIONS.

J. H. McKUNE,
Solicitor for Appellee.

In the Supreme Court of the United States.

No. 949.

THE PLYMOUTH CONSOLIDATED GOLD MINING CO. ET AL., Appellant,

vs.

THE AMADOR AND SACRAMENTO CANAL COMPANY, Appellees.

Facts.

Suit in equity to restrain a trespass and incidentally to recover damages for past trespasses, commenced in a California State Court against four tort feasors. The plaintiff and two defendants being residents of California and two defendants residents of other States.

Petition by the appellant to remove the case into the Circuit Court of the United States, Ninth Circuit, District of California, under Section 2 of the Act of 3d March, 1875 (18 Stat. 470).

Suit commenced in State Court January 13, 1885 (folio 1 to 9).

Summons served on appellant February 5, 1885 (folio 11).

Summons served on defendant, Montgomery, February 4, 1885 (folio 11).

Appearance of defendant, Hobart, entered by stipulation March 23, 1885, and time to demur as to all defendants enlarged by stipulation to March 28, 1885 (folio 67).

Time further extended by stipulation to plead or move on or before March 28, 1885 (folio 72).

The defendants filed demurrer in State Court April 3, 1885 (folios 15 to 19).

The case came on regularly to be heard on said demurrer, in the State Court, April 6, 1885 (folio 23), and the defendants withdrew their demurrer and took ten days to answer.

April 15, 1885, the defendants answered and filed petition to remove (folios 24 to 62).

The rules of Court make monthly terms for setting cases for trial, and weekly sessions for hearing demurrers (folios 68 *et seq*).

After the record was filed in the Circuit Court appellees moved to remand (folios 76 to 79).

Motion granted (folio 79).

Argument.

I.

The controversy is not *wholly* between citizens of different States. Sections 2 and 3, of Act 3d March, 1875. Neither can the case be wholly determined without the presence of all the parties.

The plaintiff in the State Court had a right to join all tort feasors guilty of doing the wrong.

Dicey on Parties, 449.

Hillman v. Newington, 57 Cal. 56, and cases there cited.

Such controversies are not severable at the instance of one wrong-doer, and the Circuit Court did not err in remanding the case to the State Court.

Smith v. Rives, 2 Sumner, 347.

Ex parte Andrews and Mott, 40 Ala. 644.

Hyde v. Rubb, 14 Otto, 407.

Corbin v. Van Brandt, 105 U. S. 395.

Prie v Tuedt, 115 U. S. 41.

Ayers v. Wiswall, 112 U. S. 187.

Stearin v. N. Y., 115 U. S. 248.

II.

As to the right of a plaintiff to join all wrong-doers as defendants, see

Sir John Hayden's Case, 11 Coke, 5.

Dicey on Parties, (436) 454.

King v. Hoare, 13 M. & W. (505) 494.

Cooly on Torts, 134.

III.

The petition was not filed either before or at the term at which the cause could be first tried.

(*a*) The argument of a demurrer is a trial within the meaning of the Act.

Alley v. Nott, 111 U. S. 472.

Schoaff v. Levy, 112 U. S. 711.

(*b*) By the rules of Court the case could have been tried at the March Term, 1885, on demurrer, and the petition to remove was not filed till April. The fact that time to plead was enlarged by stipulation is no answer.

Babbitt v. Clark, 103 U. S. 606.

Pullman P. C. Co. v. Speck, 113 U. S. 84.

(*c*) The act requires the petition to remove to be filed *before* the trial. We submit that when the case is regularly called for trial on demurrer, and to escape the argument, the defendants withdrew their demurrer, it is then too late to file their petition for removal.

The order remanding should therefore be affirmed.

J. H. McKune,
Solicitor for Appellee.

In the Supreme Court of the United States.

No. 949.

THE PLYMOUTH CONSOLIDATED GOLD MINING CO. ET AL., Appellant,

vs.

THE AMADOR AND SACRAMENTO CANAL COMPANY, Appellee.

To Plymouth Consolidated Gold Mining Company, appellant in said cause, and John H. Boalt, Esq., its solicitor, and to A. Hayward, E. L. Montgomery and Walter S. Hobart.

Take notice that at the opening of said Court, on the 26th day of April, 1886, or as soon thereafter as the matter can be reached, I will on behalf of the Amador and Sacramento Canal Company, appellee, move said Court, at the court room thereof, in Washington, D. C., to advance said cause on the calendar of said Court and to submit the same for decision on the brief of the appellee, a copy of which is hereto attached.

Also take notice that at the same time and place I will move said Court to affirm the order appealed from, on the ground that said appeal was taken for delay only, and because the question on which the jurisdiction depends is so frivolous as not to need further argument, which motion will also be submitted on the brief hereto attached.

Respectfully,

Dated February 20th, 1886.

J. H. MCKUNE,
Solicitor for Appellee.

118-264

MAR 25 1886
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

No. 950.

THE PLYMOUTH CONSOLIDATED GOLD MINING COMPANY ET AL.,
Plaintiff in Error,

vs.

THE AMADOR AND SACRAMENTO CANAL COMPANY, Defendant in Error.

Brief on motion to dismiss writ of error.

This case contains the same record removed into this Court by Appeal No. 949.

The plaintiff in error is not entitled to maintain two proceedings in this Court, to reverse the same order entered in the Circuit Court, and as appeal is the proper remedy in a suit in equity for injunction this case should be dismissed.

J. H. MCKUNE,
Attorney for Defendant in Error.

In the Supreme Court of the United States.

No. 950.

PLYMOUTH CONSOLIDATED GOLD MINING COMPANY, Plaintiff in Error.

vs.

THE AMADOR AND SACRAMENTO CANAL COMPANY, Defendant in Error.

To Plymouth Consolidated Gold Mining Company, plaintiff in error, and J. H. Boalt, Esq., its attorney, and to A. Hayward, E. L. Montgomery and Walter S. Hobart.

Take notice that on the 26th day of April, 1886, at the opening of said Court, on that day or as soon thereafter as the matter can be reached, I will, on behalf of the Amador and Sacramento Canal Company, the defendant in error, move said Court at the court room thereof, at Washington, D. C., to dismiss the writ of error sued out in said cause, on the ground that the case made by the pleadings is a suit in equity, and appeal is the proper remedy.

Said motion will be made and submitted on the printed brief of defendant in error, a copy of which is hereto attached.

Respectfully,

Dated February 20, 1886.

J. H. MCKUNE,
Attorney for Defendant in Error.